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Reflections on standing for judicial review in procurement cases

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1. Introduction

The purpose of this article is to consider the case law on the requirement of standing to bring judicial review proceedings to challenge decisions made in the context of public procurement. There are suggestions in this case law that the approach to standing in such cases is narrower than that normally adopted in judicial review proceedings. It is the contention of this article that such suggestions should be firmly resisted.

The extent to which the public procurement decisions of public authorities are amenable to judicial review is itself controversial.¹ On the one hand, some argue that the rule of law requires that public law principles of rationality and fairness in principle apply in the ordinary way to all decisions made by public authorities, including contracting decisions. Contracting decisions should be amenable to judicial review provided a public law ground is raised.² On the other, some argue that public authority contracting decisions should essentially be seen as governed by private law. The position is most closely contested where the unlawful act alleged comprises non-compliance with public procurement regulations that implement EU directives.³ Here, it has been suggested that, other than in very exceptional circumstances, the only persons who should be regarded as entitled to raise arguments based on such breaches are “economic operators” as defined in the

¹ See S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (London: Sweet & Maxwell, 3rd edn, 2014) pp 117-128.

² See S.H. Bailey, “Judicial review of contracting decisions” [2007] P.L.444, cited with approval by Kenneth Parker J. in *R (on the application of A) v Chief Constable of B Constabulary* [2012] EWHC 2141 (Admin).

³ Eg the Public Contracts Regulations 2006 (SI 2006/5), replaced, with effect from February 26, 2015, by the Public Contracts Regulations 2015 (SI 2015/102).

regulations.⁴ It is not intended here to revisit the amenability to judicial review debate directly. However, echoes of that debate can be discerned in cases on the (separate) issue of standing to bring a claim for judicial review, and it is this issue on which the present article is focused.

It is well established in the modern case law on judicial review in England and Wales that a broad and flexible approach is to be adopted to the question of standing. The statutory test is whether the claimant “has a sufficient interest in the matter to which the application relates”.⁵ In *R v Inland Revenue Commissioners Ex p National Federation of Self-Employed and Small Businesses Ltd*⁶ the House of Lords by a majority⁷ held that the applicants did not have standing to seek judicial review of an “amnesty” in respect of tax evasion given by the IRC to Fleet Street casual workers. However, there was general agreement that an unduly restrictive approach to standing for a claim for judicial review should not be adopted⁸ and a decision⁹ that an applicant for mandamus had to show a specific legal right was expressly disapproved. The appropriateness of a broad rather than narrow approach was confirmed in subsequent case law in the High Court and the Court of Appeal.¹⁰ A range of factors may be relevant determining standing, including

⁴ See the approach of Forbes J. in *Chandler v Camden LBC; Chandler v Secretary of State for Children, Schools and Families* [2009] EWHC 219 (Admin), disapproved by the Court of Appeal: *R (on the application of Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011 but it would seem supported by counsel in argument in *R (on the application of UNISON) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 (Admin): see further n.74. The approach to standing of the Court of Appeal in *Chandler*, while not as restrictive as Forbes J., can be interpreted as narrower than the normal approach in judicial review cases and is criticised on that basis below: see Part 6.

⁵ Senior Courts Act 1981 s.31(3).

⁶ [1982] A.C.617.

⁷ Lords Wilberforce, Fraser and Roskill. Lords Diplock and Scarman held that the applicants would have had standing had the arrangement been ultra vires.

⁸ See, with varying degrees of emphasis, Lord Fraser at 645-646, Lord Scarman at 653, Lord Roskill at 656, 658, and Lord Diplock at 559.

⁹ *R v Lewisham Union Guardians* [1897] 1 Q.B.488.

¹⁰ Lord Woolf et al, *De Smith's Judicial Review* (London: Sweet & Maxwell, 7th edn., 2013) pp. 77-86. See eg *R v Secretary of Foreign and Commonwealth Affairs ex p World Development Movement* [1995] 1 W.L.R. 386 (WDM, none of whose members were directly affected, accorded standing to challenge grant of overseas aid to government of Malaysia); *R v Somerset CC ex p Dixon* [1997] C.O.D. 323 (individual who was local resident, parish councillor and member of environmental bodies accorded standing in respect of challenge to planning permission for quarry extension).

the legislative framework, the strength and importance of the grounds of challenge, the impact of the decision on the claimant's interests,¹¹ the public interest and the presence or absence of other challengers.¹² Because of the complexity of the matters to be considered it is unusual for permission to apply for judicial review to be refused solely by reference to lack of standing,¹³ and normal for standing to be considered at the hearing stage¹⁴ alongside the substantive grounds. It is, furthermore, unusual for a court to find that substantive grounds are made out but a remedy is refused solely on the ground of lack of standing.¹⁵

This broad approach has also now received the endorsement of the Supreme Court in two appeals from Scotland.¹⁶ However, there have also been suggestions in some quarters that a narrow approach to standing is generally appropriate in the specific context of public procurement.¹⁷ It will be contended in this article that such an approach, treating public procurement judicial reviews as a discrete subset of judicial review cases, would in principle be undesirable, for two reasons. First, it would add as an issue for litigation the complication of how to identify the subset of cases where the special rules would apply; secondly, it would undermine the rule of law in narrowing the circumstances in which unlawful action could successfully be challenged.

¹¹ *De Smith* op.cit n.10 para.2-030 notes that "If a decision interferes directly with the claimant's personal or public rights or has adverse financial consequences for him then this will be an obvious case in which he will have standing. But as the Court of Appeal has made plain, the relevance of the claimant's personal rights is not that without them there would be no claim for judicial review"

¹² *De Smith* op.cit n.10 paras 2-026-2-034.

¹³ *De Smith* op.cit n.10 para.2-017. In the *National Federation* case, the House of Lords held that, except in an obvious case, standing ought not to be dealt with as a preliminary issue at the permission stage: *ibid*.

¹⁴ This may be a "rolled-up" hearing covering both the permission application and the full hearing of the claim: *De Smith* op.cit n.10 para.16-075.

¹⁵ *De Smith* op.cit n.10 para.2-020.

¹⁶ See Parts 4 and 5 below.

¹⁷ See Parts 6 and 7 below.

A useful starting point for consideration of these matters is the recent decision of the High Court in *R (on the application of Gottlieb) v Winchester City Council*,¹⁸ a public procurement judicial review case.

2. The decision in *Gottlieb*

In *R (on the application of Gottlieb) v Winchester City Council*¹⁹ the claimant, Kim Gottlieb, applied for judicial review of the decision of Winchester City Council to authorise variations to a contract with a developer (the “development agreements”) to build a new mixed retail, residential and transport centre in the “Silver Hill” area of Winchester city centre. Lang J. held that the variations (to remove affordable housing and civic amenities) were material and, accordingly, that the decision to authorise them, without carrying out a procurement process as required by Directive 2004/18/EC and the Public Contracts Regulations 2006,²⁰ was unlawful. This aspect of the case is the subject of a separate comment in this journal.²¹

The present article concerns the issue of the claimant’s standing to bring judicial review proceedings. The claimant was a resident of Winchester, a chartered surveyor and a director of a small private property investment and development company. He had been an elected councillor of Winchester City Council for the Itchen Valley Ward since May 2011²² and a member of the council’s Silver Hill Reference Group. He was also a leading member of the Winchester Deserves Better Campaign, which opposed the scheme. He regarded the scheme as varied as being poorly designed and was concerned that affordable housing and civic amenities had been removed.

¹⁸ [2015] EWHC 231 (Admin).

¹⁹ [2015] EWHC 231 (Admin).

²⁰ SI 2006/5.

²¹ See [2015] P.P.L.R. NA 81.

²² Councillor Gottlieb is a Conservative Councillor and was re-elected on May 7, 2015. Winchester City Council was formerly a minority Conservative administration and after May 7 has a Conservative majority: www.winchester.gov.uk [Accessed May 7 and 21, 2015].

Lang J. declined an invitation by the defendants for her to exercise her discretion not to quash the decision, this being a “serious breach of the procurement regime, which is both substantive and procedural in nature”. She noted that this was the second occasion on which the council had committed such a breach in the lifetime of one contract²³ and that it would be an exceptional course to allow the council’s unlawful decision to stand.²⁴

The council also argued that “the claimant (a non-economic operator) has no interest in the observance of the public procurement regime”. Lang J. rejected this argument, noting that the claimant “in his capacity as a resident, council tax payer, and City Councillor,” had a legitimate interest in seeking to ensure that the council complied with the law, spent public money wisely and secured through open competition the most appropriate development for Winchester. He had been closely involved in the consideration of the scheme as a councillor and campaigner. His standing had not been disputed at the permission stage. It was clear that standing was not confined to those with a direct financial or legal interest²⁵ or to economic operators.²⁶ The claim was distinguishable on the facts from *R (on the application of Chandler) v Secretary of State for Children, Schools and Families*²⁷ where it was held that the claimant in that case lacked standing for a claim that a decision to establish an academy school was unlawful for non-compliance with the procurement regime. The ground for denying standing was that she was motivated by her political opposition to academies rather than any interest in the observance of the public procurement regime. This was distinguishable here as

²³ Entry to the original contract had not complied with the procurement regime then applicable, the council acting in reliance on mistaken legal advice. However, it was too late to challenge the lawfulness of the development agreement on that basis: [2015] EWHC 231 (Admin), para.[50].

²⁴ [2015] EWHC 231 (Admin) at para.[145].

²⁵ *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C.617, 694B-C.

²⁶ *R (on the application of The Law Society) v Legal Services Commission* [2007] EWCA Civ 1264, [2008] Q.B. 737 See P. Henty, [2008] P.P.L.R. NA 108.

²⁷ [2009] EWCA Civ 1011, [2010] B.L.G.R. 1. See P. Henty, [2010] P.P.L.R. NA 64 and S.H. Bailey, [2010] P.P.L.R. NA 68.

the claimant was seeking what the public procurement process was intended to provide. He had no ulterior motive.²⁸

3. Comments on the ruling on standing in *Gottlieb*

It is submitted, with respect, that Lang J.'s decision on the standing point is entirely consistent with the modern authorities on standing for judicial review (which are considered below) and is clearly right. It is unsurprising that the point was not raised at the permission stage and the fact that it was raised at the hearing could be seen as optimistic. The argument perhaps reflects a continued feeling in some quarters that litigation arising from the public procurement regime should be seen simply as a private matter for economic operators, and is no business of anyone else's. It may also reflect a hope (possibly engendered by the *Chandler* decision itself) that the position of a claimant as a campaigner against major public projects might itself be looked upon with disfavour in assessing standing. Such a development would certainly happen to chime in with statements by the Prime Minister and the then Justice Secretary seeking to justify the introduction of a variety of restrictions on access to judicial review.²⁹

4. Modern authorities on standing for judicial review: *AXA* and *Walton*

The leading modern authorities on standing in public law are two decisions of the Supreme Court in appeals from Scotland: *AXA General Insurance Ltd v H M Advocate*³⁰

²⁸ [2015] EWHC 231 (Admin) paras [151] - [153].

²⁹ Mr Cameron in a speech to the CBI on 19 November 2012: "... judicial reviews. This is a massive growth industry in Britain today ... [S]ome are well founded [B]ut so many are completely pointless. We urgently need to get a grip on this" (www.gov.uk/government/speeches/prime-ministers-speech-to-cbi, accessed 9 March 2015). Mr Grayling justified changes to judicial review by arguing, inter alia: "The judicial review system is an important way to right wrongs, but it is not a promotional tool for countless Left-wing campaigners": *Daily Mail*, 6 September 2013 (www.dailymail.co.uk (accessed 9 March 2015)). As to the restrictions that have been introduced, see below.

³⁰ [2011] UKSC 46, [2012] 1 A.C.868.

and *Walton v Scottish Ministers*,³¹ the latter drawing on the former. These cases are regarded as authoritative in England and Wales in respect of both whether a person has a sufficient interest to apply for judicial review and whether a person is a “person aggrieved” for the purposes of a statutory application to quash,³² issues on which the courts today generally adopt similar approaches.

In *Axa*, insurers whose business included writing employers’ liability insurance policies challenged the Damages (Asbestos-related Conditions) (Scotland) Act 2009³³ on the ground that it was outside the legislative competence of the Scottish Parliament, as being incompatible with a Convention right³⁴ and irrational. These challenges were rejected on the merits. One issue was whether eight individuals who had developed pleural plaques could be joined as parties under rule 58.8(2) of the Court of Session Rules³⁵ to resist the insurers’ claim. This provided that any person “who is directly affected by any issue raised” could apply to be joined as a party. The Inner House of the Court of Session held that a person could only be joined as party under this rule if they had “title and interest”, which was also the test for entitlement to bring an application for judicial review.³⁶ The Supreme Court³⁷ agreed that the same test should be applied in determining these two matters, but reversed the Inner House on the nature of the test that was to be applied. Lord Hope said that, as these proceedings lay within the sphere of public law, it was not appropriate to apply the narrow test of whether the applicants had “title and interest” to bring the proceedings, this test only being appropriate to

³¹ [2012] UKSC 44. See Baroness Hale, “Who guards the guardians” [2014] J.R.1; J.N.E. Varuhas, [2013] C.L.J. 243; C.T. Reid, “The end of the road for Walton” 2013 Jur. Rev. 53; D. Elvin, [2012] J.R. 287.

³² See n.64 below.

³³ This Act was passed to reverse (with retrospective effect) case-law that established that asymptomatic pleural plaques did not constitute an injury that could give rise to a claim for damages.

³⁴ First Protocol, art.1 (right to the peaceful enjoyment of possessions).

³⁵ This provided that any person “who is directly affected by any issue raised” could apply to be joined as a party.

³⁶ See 2011 S.L.T. 436 at paras 54-57.

³⁷ The leading opinions were given by Lords Hope and Reed, who agreed with each other. Lords Kerr, Clarke and Dyson agreed (at para.[177]) with both opinions; Lords Brown and Mance (paras [84], [85]) agreed with the views of Lords Hope and Reed on (inter alia) the issue of standing.

private law proceedings.³⁸ In proceedings concerning public law, the question should be whether the applicant had “standing” rather than “title and interest”. A person could have a “sufficient interest” for these purposes even though they could not demonstrate that they had “title” to do so. Lord Hope also expressly agreed with Lord Reed’s view³⁹ that standing has to be based on the concept of interests and not the concept of rights.⁴⁰ On the test for standing, Lord Hope said the following:⁴¹

“Like Lord Dunedin in *D & J Nicol v Dundee Harbour Trustees*, I would not like to risk a definition of what constitutes standing in the public law context. But I would hold that the words ‘directly affected’ which appear in r 58.8(2) capture the essence of what is to be looked for. One must, of course, distinguish between the mere busybody ... and the interest of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word ‘directly’ provides the necessary qualification to the word ‘affected’ to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.”

It was “plain” that the eight individuals were “directly affected”.⁴²

This passage is not wholly free from difficulty. The difficulty arises from the fact that the Court wishes to apply the same test for standing for applicants and other parties (in effect “sufficient interest”) whereas the statutory test to be joined as a party includes the words “directly affected”. It is submitted that the most natural interpretation is that any

³⁸ See Lord Dunedin in *Dundee Harbour Trustees v D & J Nicol* [1915] A.C.550, 561-562: His Lordship said that, while not defining when a person had title to sue, for a person to have such title “he must be party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies”. *De Smith* n.10 para.2-072 notes that on this approach a respondent may enter pleas of ‘no title to sue’ (by reference to Lord Dunedin’s words) and “no interest to sue’ (there must be some real rather than merely an academic question of law)” although these elements sometimes ran into each other.

³⁹ [2011] UKSC 46 at para.[170].

⁴⁰ [2011] UKSC 46 at para.[62].

⁴¹ Lord Hope, para.[63]; cited by Lord Reed in *Walton* at para.[91].

⁴² Lord Hope, para.[64].

person with a "sufficient interest," applying normal judicial review principles, is to be regarded as "directly affected" for the purposes of being joined as a party in public law proceedings. A less persuasive interpretation would be that, for a "sufficient interest," either the applicant, or the section of the public the applicant seeks to represent, must be "directly affected", bringing that in as an express general requirement. A literal interpretation of Lord Hope's wording could support that position. However, the clear purpose of the Court was to liberalise standing rules in Scotland and put them on the same footing as the position in England and Wales. In that jurisdiction, being "directly affected" is not a general requirement for standing to bring a claim for judicial review but is for a person to participate as an "interested party" to judicial review proceedings.⁴³ Accordingly, it is submitted that a literal interpretation should not be adopted. Indeed, in *Walton*, Lord Reed characterised *Axa* as involving disapproval by the Supreme Court of a restrictive approach previously adopted in Scotland in public law cases "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".⁴⁴

Walton itself concerned a statutory challenge to schemes and orders made by the Scottish Ministers under the Roads (Scotland) Act 1984 concerning the construction of a new road network (the "Western Peripheral Route") around Aberdeen. The challenge was brought under the 1984 Act Sch.2 para.2, which provides that if any "person aggrieved" by an order under the Act desires to question its validity on the grounds that it is not within the powers of the Act or that any requirement of the Act has not been complied with in relation to the order, he may, within six weeks make an application as regards that validity to the Court of Session.⁴⁵ If the court is satisfied that the order is not within

⁴³ CPR Rule 54.1(2)(f).

⁴⁴ [2012] UKSC 44, para.[90].

⁴⁵ There are many examples of similar provisions on the statute book in both England and Wales and in Scotland. The grounds are regarded as analogous to the common law grounds for judicial review: see *De Smith* op.cit n.10 para.17-029; H.W.R. Wade and C.F.Forsyth, *Administrative Law* (Oxford: OUP, 11th edn., 2014), pp 625-626. The main

the powers of the Act or that the interests of the applicant have been substantially prejudiced by failure to comply with any such requirement, it has a discretion to quash the order, either generally or in so far as it affects the property of the applicant.⁴⁶ An order may not otherwise be challenged.⁴⁷

Mr Walton was the chairman of Road Sense, a local organisation opposed to the WPR. The grounds were non-compliance with, first, the Strategic Environmental Assessment Directive⁴⁸ and, secondly, the common law requirements of fairness. The substantive grounds were rejected, but there was an extended discussion of Mr Walton's standing, the Inner House⁴⁹ having held that he was not a "person aggrieved" for the purpose of bringing the statutory challenge.⁵⁰ The leading opinion was that of Lord Reed, with whom all the other members of the Supreme Court agreed. His Lordship considered, first, whether Mr Walton was a "person aggrieved" and, secondly, whether he would have standing to invoke the court's supervisory jurisdiction (the Scottish equivalent of judicial review in England and Wales). On the first point, he noted that, both in Scotland and in England and Wales, "persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made".⁵¹

Furthermore, there were circumstances where a person who had not so participated might nevertheless be a "person aggrieved", as, for example, where an inadequate description of the development in the application and advertisement concerning the scheme could have misled him or her so that he or she did not object or take part in the inquiry. Ordinarily, however, it would be relevant to consider whether the applicant had stated his or her objection at the appropriate stage of the statutory procedure, since it

purpose of such provisions is to make a statutory application to quash brought within six weeks the exclusive remedy.

⁴⁶ 1984 Act Sch.2 para 3.

⁴⁷ 1984 Act Sch.2 para 4.

⁴⁸ Dir. 2001/42/EC.

⁴⁹ [2012] CSIH 19.

⁵⁰ 1984 Act Sch.2 para.2.

⁵¹ [2012] UKSC 44, para.[86].

was designed to allow objections to be made and a decision reached within a reasonable time as intended by Parliament.⁵² Mr Walton *had* participated in the local inquiry and was not “a mere busybody interfering in things which do not concern him”. He resided in the vicinity of the western leg of the WPR, was an active member of local organisations concerned with the environment and chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He had demonstrated a genuine concern about what he contended was an illegality in the grant of consent for a development that was bound to have a significant impact on the natural environment. He was “indubitably” a person aggrieved.⁵³

The Inner House had also stated that Mr Walton would have lacked standing even if the test were the same as would apply to an application to the supervisory jurisdiction. That view was rejected too.⁵⁴ On this point, Lord Reed referred to the views expressed by himself and Lord Hope in *Axa*.⁵⁵ The Inner House in *Walton* had held⁵⁶ that Mr Walton did not have a sufficient interest, his residence being some significant distance from the leg of the proposal particularly attacked. Lord Reed indicated⁵⁷ that the key distinction lay between the “mere busybody” from the “person affected by or having a reasonable concern” in the matter in question:

“A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application.”

⁵² [2012] UKSC 44, para.[87].

⁵³ [2012] UKSC 44, para.[88].

⁵⁴ [2012] UKSC 44, paras[89]–[96].

⁵⁵ See above.

⁵⁶ [2011] CSIH 19, at paras[36]–[38], citing Lord Hope and Lord Reed in *Axa*, including the former’s reference to the need for the claimant to be “directly affected”.

⁵⁷ [2012] UKSC 44 para.[92]. He repeated Lord Hope’s point from *Axa* that the “directly affected” test “enabled” this distinction to be drawn.

Lord Reed also emphasised the point that what constitutes sufficient interest “has to be considered in the context of the issues raised”. In some contexts, it would be appropriate to require the applicant “to demonstrate that he has a particular interest in the matter complained of”, the type of interest required depending on the context. In other situations, as where the excess or misuse of power affected the public generally, insistence on a particular interest could prevent the matter being brought before the court, and that might disable the court from performing its function to protect the rule of law.⁵⁸ Accordingly, while in many contexts, the person must demonstrate a “particular interest” there may also be cases where any individuals simply as a citizen will have a sufficient interest, without having to demonstrate any greater impact upon him – or herself 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.”⁵⁹

Finally, Lord Reed noted⁶⁰ that the interest of the applicant was not merely a threshold issue, but might bear upon the court’s discretion whether to grant a remedy.⁶¹ On the facts, the same factors as made Mr Walton a “person aggrieved” would have given him standing for an application to the supervisory jurisdiction.

Lord Hope made similar observations to those of Lord Reed, emphasising that some environmental issues could properly be raised by an applicant even though he or she was not personally affected in his or her private interest; indeed environmental law

⁵⁸ [2012] UKSC 44, para.[93], citing his own opinion in *Axa* at para.[170].

⁵⁹ [2012] UKSC 44, para.[94].

⁶⁰ [2012] UKSC 44, para.[95], agreeing with observations by Lord Carnwath at para.[103]. Here Lord Carnwath said he saw discretion “to some extent as a necessary counterbalance to the widening of rules of standing”.

⁶¹ An important dimension of the decision in *Walton* was the (obiter) holding that the court retained a discretion not to quash an order, even where there was a breach of directly effective EU law: see Lord Carnwath at paras[115] – [140]. For criticism that this view is wrong, see R. McCracken and D. Edwards, “Standing and discretion in environmental challenges; Walton, a curate’s egg” [2014] J.P.L. 304.

“proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf”.⁶² However, individuals here would need to demonstrate that they had a genuine interest in the aspects of the environment they sought to protect and that they had “sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity.”

It will be noted that neither Lord Hope nor Lord Reed suggest that there is any significant difference between the “person aggrieved” test applicable to statutory applications to quash and the “sufficient interest” test applicable to judicial review.⁶³

5. The reception of *Walton*

The observations in *Walton* have been treated as authoritative within England and Wales.⁶⁴ They are certainly generally consistent with the flexible, and relatively liberal, approach to standing to be found in cases on standing from that jurisdiction.⁶⁵

There is left, however, some uncertainty about the continuing significance of the concept of the expression “directly affected”, although there is clear confirmation that standing to

⁶² [2012] UKSC 44, para.[152].

⁶³ While there are some inconsistencies in the application of the “person aggrieved” test, some perhaps to be explained by the different statutory contexts in which the expression is used, *De Smith*, op. cit. n.10 para. 2-061 notes that “in accord with the developments which were taking place on applications for judicial review, there has been a clearly discernible trend way from the restrictive and highly technical approach to who is a person aggrieved” formerly adopted. Modern cases adopting a broad approach include *Cook v Southend BC* [1990] 2 Q.B.1; *Morbaine v First Secretary of State* [2004] EWHC 1708.

⁶⁴ The observations on the meaning of “person aggrieved” were applied in *Mackman v Secretary of State for Communities and Local Government* [2013] EWHC 3396 (Admin), paras[16]–[22] and *JB Trustees Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3555 (Admin). Observations relevant to standing for judicial review were applied in *Greaves v Boston BC* [2014] EWHC 3950 (Admin) (standing to challenge planning permission for wind turbine lost when claimant moved house) and in *R (on the application of O) v Secretary of State for International Development* [2014] EWHC 2371 (QB).

⁶⁵ See above n.10.

bring proceedings for judicial review is not invariably to be confined to those whose personal interests are affected.⁶⁶ It is possible that the difficulty really stems from the assumption of the Supreme Court in *Axa* that the test of standing to be an applicant for judicial review is the same as the test for being a party (or in England and Wales an “interested party” under CPR Rule 54). There is clear English authority that the latter test, also requiring a person to be “directly affected,” is narrower than the former.⁶⁷ It is not obvious why the position should be any different in Scotland.

A further uncertainty relates to the importance of “context”. It is submitted that the context to be considered is the context of the particular litigation, including the issues raised. It is difficult to see *Walton* as authority for the proposition that there are some general “contexts” (such as public procurement) where a narrow approach to standing is to be adopted as a matter of course in all cases, irrespective of the issues raised.

6. Standing in public procurement judicial reviews: *Chandler*

⁶⁶ See the view of the Inner House in *McGinty v Scottish Ministers* [2013] CSIH 78, [2014] S.C. 81 at para.[48]: “We consider there is force in [counsel’s] observation that what is left unresolved in [*Axa*] and *Walton* is exactly how one should go about distinguishing between [the mere busybody] ... and the individual who has the genuine interest sufficient to be accorded standing... to challenge a decision with environmental consequences which do not impact on that individual’s private interest.” The court accorded standing “at least at this stage” to a keen bird-watcher concerned to see mudflats preserved as a habitat for birds and concerned about the harmful effects of carbon dioxide emissions, in the context of designation of a major power station and transshipment hub project in Scotland’s National Planning Framework. The claim was dismissed on the merits. In a subsequent case, the “directly affected” test has been applied narrowly in Scotland in holding that interest groups applying for judicial review did not have standing: see Lord Pentland in the Outer House of the Court of Session in *In the Petition of (First) the Christian Institute; (second) Family Education Trust; (third) The Young Me Sufferers (“Tymes”) trust; (fourth) Care (Christian Action Research and Education); (fifth) and (sixth) James & Rhianwen McIntosh; and (seventh) Deborah Thomas Petitioners; for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7, criticised by B. Christman, ‘An Unholy Resurrection in the Court of Session’ UK Const. L. Blog (18th Mar 2015) (available at <http://ukconstitutionallaw.org/>).

⁶⁷ *R (on the application of Williams) v Legal Services Commission* [2004] EWHC 163; cf *R v Rent Officer Service, ex p Muldoon* [1996] 3 All E.R. 498. In *Williams*, McCombe J. held that a drug company was not “directly affected” by the result of proceedings for judicial review of the LSC’s decision to end funding for civil proceedings against this (and other) drug companies claiming that the MMR vaccine had caused the claimants serious disabilities; while the drug company might have had standing to seek judicial review of the grant of public funding, the test here was narrower.

It may be, however, that that narrow approach is the position that is being and will continue to be pressed by those defending judicial review proceedings in cases concerning public procurement. Some ammunition is available in the wording of Arden L.J.'s judgment in *Chandler*, where she said⁶⁸ that the court inclined to be the view that a person other than an economic operator, with a sufficient interest, could bring judicial review proceedings to secure compliance with public procurement law. He or she might have such an interest if he or she could show that such compliance "might have led to a different outcome that would have had a direct impact on him". The court could also envisage cases "where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event". It is submitted that this twin formulation seems focused on either end ("direct impact on the individual": "grave cases") of what is properly, as made clear in the opinions in *AXA* and *Walton*, to be regarded as a spectrum. In particular, the general case law on standing recognises that there may well be cases where a person or body that is not personally or directly affected is accorded standing as a matter of the public interest.⁶⁹ In these cases, while the seriousness of the infringement of public law can be *relevant* to standing, along with other factors,⁷⁰ it is not suggested that standing based on the public interest is confined to cases where it can be shown that there has been a "grave" departure from public law obligations.

7. The reception of *Chandler*

How has *Chandler* been interpreted and applied in subsequent cases? In *R (on the application of UNISON) v NHS Wiltshire Primary Care Trust*,⁷¹ Eady J. held, as a preliminary issue, that UNISON did not have standing to challenge the decisions of ten PCTs in the South West of England to enter contracts with NHS Shared Business Services

⁶⁸ [2009] EWCA Civ 1011, para.[77].

⁶⁹ See *De Smith*, op. cit. n.10, paras 2-032, 2-036.

⁷⁰ See above n.11.

⁷¹ [2012] EWHC 624 (Admin). See comments by P. Henty, [2012] P.P.L.R. NA203. See also *Re Traffic Signs and Equipment Ltd* [2012] NICA 18 (applying the "direct impact" test from *Chandler*).

Ltd⁷² that involved the out-sourcing of Family Health Services. The challenge would have been that the defendants were at some point in breach of the Public Contracts Regulations 2006. Counsel for the defendant argued that *Chandler* was simply wrong and that such a breach as was alleged here should not sound in public law at all.⁷³ However, Eady J. held⁷⁴ that that had to be an argument for another day. Counsel was successful in arguing, in the alternative, that UNISON lacked standing on the test propounded by Arden L.J. in *Chandler*.⁷⁵ It could not be established that the decisions might have had a direct impact on UNISON members⁷⁶ or that there had been a “grave” departure from public law obligations (this being a “high threshold”). Eady J. emphasised his decision was made “very much in the specific context of the 2006 regulations”. He was not prepared to go so far as to apply the terminology used in *Dixon*⁷⁷ and hold that the claimant was a “busybody”: that would be “inappropriate and

⁷² NHS SBS is a “unique joint venture between the Department of Health and Sopra Steria”: www.sbs.nhs.uk/.

⁷³ He said it was unfortunate that the Court of Appeal in *Chandler* had not addressed two relevant cases: *R v Brent LBC, ex p O'Malley* (1997) 30 H.L.R. 328, 355–356 (Schiemann L.J.) and 373-374 (CA), and *Risk Management Partners v Brent LBC* [2010] L.G.R. 99 at [250]. In *O'Malley* Schiemann L.J. left open but thought to be of “some merit” an argument that, even if there had been a breach of the Public Works Contracts Regulations 1991 (SI 1991/2680), then, by virtue of reg.31(7), once the contract had been concluded, only damages could be awarded; this meant that non-compliance with the regulations in itself could not render the contract void. Schiemann L.J. noted that the applicants had tried to get round this by alleging a failure to consider the regulations or the possibility of compensation claims, but those allegations failed on the facts. The Court of Appeal agreed (at p.374) that “in view of the terms of reg.31, and the conduct of the council already noted in this context, judicial review would not have been an appropriate remedy.” At p.373 the court also noted that “in any event no claims have been made by anyone with an interest in carrying out the works”; it is not clear what significance it attached to that point. Para.[250] of *Risk Management Partners* (in the judgment of Moore-Bick L.J.) concerns the issue of delay, although it does include the proposition that a claim under the regulations is “an action to vindicate private rights”. It is submitted that it is difficult to see that these cases add anything of substance to the full argument vigorously deployed by the Secretary of State in *Chandler* that non-compliance with the procurement regime was a matter of private law, which argument the court explicitly rejected.

⁷⁴ [2012] EWHC 624 (Admin), para.[6]. His Lordship did not explain why. It may have been on the basis of the clear (albeit obiter) Court of Appeal authority in *Chandler* and uncertainties as to whether that decision could be challenged successfully as per *incuriam*. It may be because UNISON lacked standing anyway: see below.

⁷⁵ *Ibid.* paras [7]–[16].

⁷⁶ It was not known what might have happened if the Regulations had been applied; there were no known candidates who could have expected to bid; “contemplation of any such hypothetical scenario is bound to be speculative”: para.[12].

⁷⁷ See above n.10.

unnecessarily offensive". There might have been analogy with *Chandler* in the sense that it might have been said that UNISON was not primarily concerned to promote open competition but "rather to put a spoke in the process of outsourcing to SBS". This was not, however, a necessary element in the reasoning process for disposing of the case.⁷⁸ The claim was also rejected on the grounds of delay.

Eady J.'s approach to standing does suggest that a narrower approach is appropriate in the context of public procurement than generally in judicial review, given the distancing from Sedley J.'s judgment in the planning context in *Dixon*. It is submitted that this would be unfortunate, given that the general point that issues concerning standing can only properly be judged in the light of the facts of the case and the specific arguments presented would seem as applicable in public procurement cases as elsewhere. The fact that the regulations do establish a special civil regime under which economic operators can bring challenges on specified grounds is not in itself sufficient to justify a narrow approach to judicial review standing in all procurement cases. However, it is not clear whether the answer in *UNISON* would have been different had a broader, more orthodox, approach to standing been adopted. Eady J.'s reluctance to characterise UNISON as a "mere busybody" suggests that it might. It may be that he was simply being polite. It has, furthermore, been noted⁷⁹ that UNISON had been consulted and had made representations, considerations which are generally accepted to be pointers in favour of standing.⁸⁰

It is interesting to compare the approach of Eady J. in the *UNISON* case with that of Cranston J. in *R (on the application of (1) National Union of Rail, Maritime and Transport Workers, (2) Transport Salaried' Staffs' Association and (3) Associated Society of*

⁷⁸ [2012] EWHC 624 (Admin) at para.[15].

⁷⁹ P. Henty, [2012] P.P.L.R. NA 203, NA 207.

⁸⁰ *R (on the application of the Law Society) v Legal Services Commission* [2007] EWHC 1848. Cf the point that participation in a local inquiry will help establish that a person is "aggrieved" for purposes of statutory application : see *Walton*, above n.51.

*Locomotive Engineers and Firemen) v Secretary of State for Transport*⁸¹ in dismissing (on the ground of delay) a renewed application by the rail unions for permission to apply for judicial review of a decision to award rather than tender a short extension to an existing rail franchise. In his Lordship's view the comments in *Chandler*

"about ideological claims have no purchase in this context. The claimants' policy may be the replacement of competitive tendering with nationalisation of the railways, but that does not detract from the sufficient interest which they have in these matters. I am persuaded by Mr Cash's witness statements that the claimants are arguably within the class of persons with a genuine interest and expertise in ensuring the Secretary of State's compliance with the regime laid down in Regulation (EC) 1370/2007."⁸²

It is submitted that this approach, in simply asking whether there was a "sufficient interest" and (echoing one aspect of *Walton*) taking account of the expertise of the claimants, is to be preferred. It is also welcome that evidence of an ideological objection to privatisation is not to be taken as a bar to standing for a claim that a project should have been tendered. In any case where it is arguable that a claim for judicial review is justified to protect the public interest, it is not obvious that even a dominant motive on the part of the particular claimant to obstruct a project opposed on political grounds should prevent a claimant being accorded standing.

It is also welcome that Warby J. in *R (on the application of O) v Secretary of State for International Development*⁸³ held that what was seen the narrower approach adopted in *UNISON*, based on *dicta* in *Chandler*, did not provide authoritative guidance in a different context. Here the question was whether an Ethiopian citizen who claimed to have been a victim of human rights abuses in the course of an Ethiopian government programme

⁸¹ [2014] EWHC 3030 (Admin).

⁸² [2014] EWHC 3030 (Admin), para.[22]. Art 5(5) of Reg. (EC) 1370/2007, on public passenger transport services by rail and road, enables a direct award to be made as an emergency measure.

⁸³ [2014] EWHC 2371 (QB).

had standing to challenge the conduct of the Secretary of State in connection with the grant of development assistance to Ethiopia. It would be contended that the programme had been at least indirectly funded via development assistance money from the UK. The “impact or prospective impact on the claimant and his family could be described as indirect but it is not remote”. That was enough to satisfy the requirement of a sufficient interest.

8. Other developments in judicial review

The adoption in a particular context of a narrower approach to standing also seems odd in the light of the steps (some highly controversial) the Coalition Government has taken to deter people from applying for judicial review.⁸⁴ The stated purpose of these changes has been to prevent “abuses” that “act as a brake on growth”.⁸⁵ Among the changes have been: the shortening of time limits in planning and procurement cases;⁸⁶ an increase in fees and introduction of a new fee for oral renewal of a permission hearing;⁸⁷ removal of the right to a reconsideration at a hearing of the application for permission to bring judicial review (an oral renewal) in any case where the application is certified as totally without merit by the judge considering the application on the papers;⁸⁸ the establishment of a new Planning Court within the Queen’s Bench Division of the High Court;⁸⁹ financial reforms, “the aim being to deter claimants from bringing or persisting with weak cases”;⁹⁰ a lower threshold test for when a defect in procedure would have

⁸⁴ See Ministry of Justice, *Judicial Review; proposals for reform* (Consultation Paper CP 25/2012, December 2012); Ministry of Justice: *Reform of Judicial Review: the Government response* (April 2013); Ministry of Justice, *Judicial Review Proposal for Further Reform* (Cm 8703, September 2013); Ministry of Justice, *Judicial review – proposals for further reform: the Government response* (February 2014).

⁸⁵ Chris Grayling, Lord Chancellor and Secretary of State for Justice, Ministerial Foreword to the February 2014 document.

⁸⁶ See now C.P.R. Rule 54.5(4)–(6), inserted by SI 2013/1412 r.4(a)(iii).

⁸⁷ See the Civil Proceedings Fees (Amendment) Order 2014 (SI 2014/874).

⁸⁸ See now C.P.R. 54.12 (7), inserted by SI 2013/1412 r. 4 (b) (ii).

⁸⁹ See C.P.R. Rule 54.21 – 54.24, inserted by SI 2014/610, r. 3 and amended by SI 2014/1233 r. 4.

⁹⁰ See the Criminal Justice and Courts Act 2015, ss 85-90. Applicants will be required to disclose information about the financing of the application; the court must have regard to this information when determining by whom and to what extent costs of or incidental to judicial review proceedings are to be paid, and will be able to order costs to be paid

made no difference to the original outcome,⁹¹ and broadening provision for “leapfrog” appeals directly to the Supreme Court from the High Court and the Upper Tribunal.⁹² At the same time, the Supreme Court in *Walton* affirmed, and indeed extended, recognition of the discretion to refuse a remedy. It is of particular interest that, in the light of the changes it was introducing (and in fact the overwhelming hostility of respondents to consultation on the point),⁹³ the Government, although “clear that the current approach... allows for misuse”, did not take forward its proposal that the test for standing for judicial review be changed to one requiring a direct interest.⁹⁴ If the Government is not making this change, why should the courts choose to adopt that approach in any specific context?

9. Conclusion

There are overwhelming indications, including from the decision in *Walton*, that the general test for standing for judicial review remains broad and liberal. The reference to “direct affect” in *AXA*, read in the light of the comments in *Walton*, are not to be taken as requiring generally a person not “directly affected” to be able to show that there has been a “grave” breach of public law principles. Something like this position appears to have been adopted in the procurement context by Arden L.J. in *Chandler*. However, it is submitted that it is undesirable in principle for public procurement decisions to be

by a person, other than a party to proceedings, who is providing financial support. Interveners will only be awarded costs in exceptional circumstances. In specified circumstances costs generated for others by their intervention will be awarded against interveners. The making of costs applying orders will be restricted.

⁹¹ See the Criminal Justice and Courts Act 2015 s.84, which will amend the Senior Courts Act 1981 s.31 to provide that the High Court must refuse to grant relief or leave “if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. This may be disapplied if it considers that it is appropriate to do so for reasons of exceptional public interest. The same will apply to the Upper Tribunal.

⁹² See the Criminal Justice and Courts Act 2015 ss 63, 64.

⁹³ Among the reasons given for opposing the change were that claims brought by groups or organisations without a direct interest should continue to be possible (there were relatively few such claims and these tended to be more successful than on average); the changes would impact on meritorious claims and would move the focus from challenging public wrong to protecting private rights; there would be litigation costs. See also comments by one of the respondents, J. McGarry, [2014] J.R. 60.

⁹⁴ See the February 2014 document (n.84), pp 7, 10 – 11, 26 – 28.

regarded as a special enclave within which a narrow test for standing, narrower than that generally applicable in judicial review, is to be applied. It is not obvious that that was intended by Arden L.J. in *Chandler*, but that does now seem to be how it is being interpreted by some.⁹⁵ Given that it is only in relatively exceptional circumstances that public procurement decisions are in any event amenable to judicial review,⁹⁶ it is odd that a decision which would otherwise be quashed as unlawful can remain in place simply because an artificially narrow approach is taken to the question of standing. It is all the odder for this to happen at a time when the Government is making it more and more difficult in other ways to claim for judicial review to be brought and the courts are emphasising the width of the general discretion to refuse relief.

A final thought is this. Are there to be other subject areas within the scope of public law where it will be argued that a narrower-than-normal approach to standing should be adopted? It is submitted that developments whereby the *rules* of judicial review (as distinct from the *application* of the *normal* rules) would differ from area to area would add complexity to the law, necessitating unhelpful litigation on where the boundaries between these different areas should be drawn. Such developments should be firmly restricted. In *Gottlieb*, Lang J. simply asked and answered the question whether the claimant had a "sufficient interest", a straightforward approach that is to be commended.

8415 words

⁹⁵ Compare *UNISON* on the one hand with *R (on the application of O) v Secretary of State for International Development*, above.

⁹⁶ See *Chandler*.

