INTERVENTION

Intervention today

1. Intervention exists in broadly the same guises in all common law jurisdictions. It has wide application at international level, for example in the European Court of Human Rights, the Court of Justice of the European Union, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. It is to be found in its most sophisticated form in the United States, particularly in the Supreme Court.

2. Intervention is a generic procedure and as such spans public and private litigation, and criminal proceedings.[1] As Sedley LJ put it in Roe v Sheffield City Council [2003] EWCA Civ 1 [2004] QB 653:

> *84. The proper role and usefulness of intervening parties is still being worked out by our courts. In this respect we are several generations behind the United States and Canada, but we are finding our own way. The most apparent value of interventions is in public law cases, where aspects of the public interest in a legal issue of general importance may be represented by neither of the two parties before the court. Both NG0s and ministers may play a valuable role here. They have recently done so, for example,* in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213*, CA, where the Secretary of State for Health intervened importantly on the interpretation of the statutory National Health Service regime, and in S and Marper v Chief Constable of S Yorks* [2002] EWCA Civ 1275*, where a submission by the organisation Liberty proved of value to this court in resolving an otherwise polarised argument.*
>
> *85. There is no reason in principle why the usefulness of interventions by third parties should be confined to public law cases. In the report of the committee set up by Justice and the Public Law Project and chaired by Sir John Laws, A Matter of Public Interest (1996), it was pointed out that private law litigation could from time to time raise issues affecting the public interest, but that the provision for first-instance joinders made at that time by RSC Order 15 rule 6(2)(b), in contrast to the larger power given to this court by RSC Order 59 rule 8(1), would not ordinarily admit public interest interventions. The committee's recommendations now find expression in CPR 54.17 and in PD 54.13 in relation to judicial review proceedings; but there is no reason why the High Court in the exercise of its inherent jurisdiction should not be able to act likewise; and it is in the exercise of its own inherent jurisdiction that this court has admitted the Secretary of State as an intervener on the present appeal.*

3. It might be credibly claimed that since those words intervention has gained a critical mass such that it has become a part of the landscape of the courts of England and

[1] Eg **R v Smith (Lance Percival)** [2003] EWCA Crim 283, [2003] 1 WLR 2229 in which Liberty was given leave by the Registrar of Criminal Appeals to make a written intervention in an appeal by a black Defendant who complained amongst other things that it was a breach of article 6 (1) of the European Convention on Human Rights that he had been tried and convicted by an all-white jury

Wales, particularly the Supreme Court.[2] This view is supported by the jurisprudence and the volume of recent writing on the subject.[3]

4. In the Supreme Court the numbers are:[4]

   4.1 2010: judgment in 46 cases, 16 appeals involved interveners (35%). As some cases were linked there were 14 judgments in cases involving interveners.

   4.2 2011: judgment in 80 cases. 31 involved interveners (39%). As some cases were linked there were 23 judgments in cases involving interveners.

   4.3 2012: judgment in 67 cases to date (November 2012). 36 involved interveners (54%). As some cases were linked there were 19 judgments in cases involving interveners.

5. Yet to come is the judgment of the 7 member Court in **R (on the application of Prudential plc) v Special Commissioner of Income Tax**, on the issue whether, at common law, legal professional privilege applies to communications between a client and an accountant seeking and giving legal advice on tax law. In that appeal there were 5 interveners.[5]

6. Interveners have been involved in the following appeals concerning judicial review in which judgment has been given by the Supreme Court in 2012:

   6.1 **Secretary of State for Foreign and Commonwealth Affairs (Respondents) v Yunus Rahmatullah (Appellant)** [2012] UKSC 48, 31 Oct 2012 – habeas corpus – Pakistan national captured and passed to United States Forces by British Forces

   JUSTICE represented by Thomas de la Mare QC and Fraser Campbell (Instructed by Allen & Overy LLP)

   6.2 **R (on the application of Alvi) (Respondent) v Secretary of State for the**

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[2] It was therefore not coincidence that the last judgment of the House of Lords and the first Supreme Court appeal involved interveners: see *Public Interest Interventions in the Supreme Court: 10 Virtues* Michael Fordham QC referring to Purdy, R (on the application of) v Director of Public Prosecutions [2009] UKHL 45 (30 July 2009) [2010] AC 345 and HM Treasury v Ahmed & Ors [2010] UKSC 2 (27 January 2010) [2010] 2 AC 534

[3] See e.g. The Public Law Project: *Third Party Interventions and Judicial Review: An Action Research Study* May 2001; Hannett *Third Party Interventions: in the Public Interest? (2003) PL 128;* Ashi and O'Cinneide *Third-Party Interventions: the Public Interest Reaffirmed;* Sir Henry Brooke *Interventions in the Court of Appeal* (2007) Public Law 401; Fordham *Public Interest Intervention: a Practitioner's Perspective* [2007] PL 410; (d) The Public Law Project: *Third Party Interventions-a Practical Guide* 2008; JUSTICE: *To Assist the Court; Third Party Interventions in the UK* October 2009; *Public Interest Interventions in the Supreme Court: Ten Virtues* Michael Fordham QC 2009. This material followed the seminal JUSTICE/Public Law Project Report: A Matter of Public Interest: Reforming the Law and Practice on Interventions in Public Interest Cases (1996).

[4] The 2009 figures are only from October: judgment in 21 cases.[4] 11 appeals involved interveners (52%). As a number of appeals were linked there were 7 judgments in cases involving interveners.

[5] (a) The Law Society of England and Wales (b)The General Council of the Bar of England and Wales (c) The Institute of Chartered Accountants in England and Wales; (d) Association Internationale pour la Protection de la Propriété Intellectuelle UK Group; (e) Legal Services Board. The Supreme Court released its judgment (after delivery of this paper) on 23 January 2013 dismissing the appeal: [2013] UKSC 1; [2013] 2 W.L.R. 325

Home Department (Appellant) [2012] UKSC 33, 18 Jul 2012 – changes in immigration rules – extended requirement of parliamentary scrutiny

Joint Council for the Welfare of Immigrants represented by Richard Drabble QC, Shahram Taghavi, Charles Banner (Instructed by Lewis Silkin LLP)

6.3 **R (on the application of Munir and another) (Appellants) v Secretary of State for the Home Department (Respondent)** [2012] UKSC 32, 18 Jul 2012 [as per **Alvi]**

6.4 **R (on the application of KM) (by his mother and litigation friend JM) (FC) (Appellant) v Cambridgeshire County Council (Respondent)** [2012] UKSC 23, 31 May 2012 – legality of local authority's assessment of needs of sick and disabled person

The National Autistic Society; The Guide Dogs for the Blind Association; SENSE; The Royal National Institute of Blind People represented by Richard Gordon QC and Victoria Wakefield (Instructed by Irwin Mitchell LLP)

Secretary of State for Health

6.5 **R (on the application of Halligen) v Secretary of State for the Home Department** [2012] UKSC 20, 23 May 2012 – construction of Extradition Act 2003

The Government of the United States of America John Hardy QC Ben Lloyd (Instructed by Crown Prosecution Service, Special Crime Division Extradition Unit)

7. A similar evolution can be found in the Court of Appeal. According to statistics provided by the CAO the number of applications by interveners rose from 15 in 2006 to 35 in both 2010 and 2011. Those numbers are probably conservative because there has been no uniform process by which the Court of Appeal has permitted intervention.

8. Intervention has become so common the field is becoming crowded, particularly in public law. By far the biggest intervener is the State.[6] Since 1997, when JUSTICE was first allowed to intervene in the Thompson and Venables case **R v Home Secretary ex parte T & V** [1997] 3 WLR 23, it has intervened in more than twenty cases before the House of Lords/Supreme Court.[7] Since 2001 LIBERTY has intervened on at least 36 occasions in the domestic courts, and has intervened on numerous occasions in the European Courts.[8] As well as the usual suspects, new faces are appearing: Article 19, AIRE Centre, Age UK, INQUEST, Mind, Southall Black Sisters, Henna Foundation, National Autistic Society, Royal College of Nursing, The Children's Society, WWF

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[6] Third-Party Interventions by the Government, Philip Havers QC & Christopher Mellor [2004] JR 130. The State's intervention can cause all manner of problems ranging from inequality of arms to costs. It has been said that a knock-on effect of the State's intervention is that it not infrequently necessitates intervention by public interest interveners and NGOs because it opens up issues and raises the profile of the proceedings.

[7] See a list at www.justice.org.uk/pages/past-interventions.html

[8] See a list at www.liberty-human-rights.org.uk/about/legal/interventions.php

(UK), Reunite, Shelter, British Residents' Society, Ipsea Limited[9] amongst others.

9. Undoubtedly interveners have made an extraordinary contribution to English jurisprudence in a comparatively short period.

Classifying interveners

10. Broadly speaking "Interveners"/"intervenors" are outsiders who are permitted to have a say in the issues in the litigation. A closer examination reveals a more subtle picture. The expression may be used to describe any one or more of a range of entities including amicus curiae, interested parties, interveners joined as parties, non-party public interest interveners and private interest interveners.

11. The Civil Procedure Rules provide for some forms of intervention. Others are outside the CPR. If you hear the term "intervener", it is important to ascertain the exact status of the entity because that is likely to have a bearing on the intervener's rights and liabilities. For example (a) is the intervener liable for costs; (b) does the intervener have a right of appeal?

12. Interveners usually fall into one of the following categories:

12.1 *Parties added pursuant to rule 19.4 (2) (b)*

Rule 19.4 Procedure for adding and substituting parties
19.4 †
(1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.
(2) **An application for permission under paragraph (1) may be made by—**
(a) an existing party; or
(b) a person who wishes to become a party.

12.2 *Interested parties*

Rule 54.1 prescribes:
(2) In this Section—…
(f) **"interested party"** means any person (other than the Claimant and Defendant) who is directly affected by the claim; ..

12.3 *"Any persons" pursuant to rule 54.17*

Rule 54.17 Court's powers to hear any person
54.17 †
(1) Any person may apply for permission—
(a) to file evidence; or
(b) make representations at the hearing of the judicial review.
(2) An application under paragraph (1) should be made promptly.[10]

[9] Ipsea Limited is a charity that provides legal advice and support to parents and carers of children with special educational needs

[10] An application pursuant to the above may be dealt with without a hearing where all the parties consent (Part 54 PD 13.1). Permission should be sought by letter by a proposed intervener identifying the claim etc. in the terms of PD 13.3. See the precedent(s) available at

12.4 *Interveners permitted pursuant to the inherent jurisdiction of the court*

In private proceedings the Civil Procedure Rules do not make any explicit provision for third party interventions. However in appropriate cases the court will permit intervention by exercising its inherent jurisdiction: see **Roe v Sheffield City Council [2003] EWCA Civ 1** [2004] QB 653; **Golden Eye (International) Ltd v Telefonica UK Ltd** [2012] EWHC 723 (Ch)

12.5 *Amicus curiae – Advocate to the Court*

In most cases, an Advocate to the Court is appointed by the Attorney General, following a request by the court pursuant to a memorandum issued by the Attorney-General and the Lord Chief Justice on 19 December 2001.[11] Paragraphs 3 and 4 of the Memorandum set out the usual parameters of such appointments:

> *3. A court may properly seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. In those circumstances the Attorney General may decide to appoint an Advocate to the Court.*
>
> *4. It is important to bear in mind that an Advocate to the Court represents no-one. His or her function is to give to the court such assistance as he or she is able on the relevant law and its application to the facts of the case. An Advocate to the Court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts. In particular, it is not appropriate for the court to seek assistance from an Advocate to the Court simply because a Defendant in criminal proceedings refuses representation*

See eg **In re Press Association** [2012] EWCA Crim 2434 (jurisdiction of Crown Court to make an order restricting publication of the name of a defendant convicted of sexual offences for the purpose of protecting the interests of others; appointment of amicus to argue issues not raised with by the parties). [12]

In 2007 Michael Fordham QC urged that it was "… *time to revolutionise the amicus, using court-appointed advocates with greater prevalence and enhanced independence."* However because of the conceptual and logistical baggage associated with the amicus, it is unsurprising that this idea has not sparked.[13]

A high level justification for intervention

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www.publiclawproject.org.uk/documents/3rdPartyInterventionsGuide.pdf A successful applicant is not a party or an interested person. An intervener has no power to appeal to the Court of Appeal and is not a Respondent to the proceedings in the Court of Appeal because it was not a party to the proceedings.

[11] Memorandum on Requests for the appointment of an Advocate to the Court issued by the Attorney-General and the Lord Chief Justice on 19 December 2001;

[12] The court may give directions that it wishes to hear an amicus argue particular issues/take a particular line because of the circumstances of the case: see eg **Armstrong, R v** [2012] EWCA Crim 83 (01 February 2012)

[13] See eg the problems Fordham himself refers to in relation to the use of an Amicus: "*Public Interest" Intervention: a Practitioner's Perspective* [2007] PL 410 at 412

13. In Webster v Reproductive Health Service O'Connor J gave an elegant statement of the reasons why the United States Supreme Court is willing to listen to interveners:[14]

> *"The willingness of Courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and to public participation in government decision making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect."*

Intervention on the ground

14. At a more pragmatic level another American judge has said that amici briefs help the Court to avoid factual and legal error, provide expert assistance in complex specialist areas and help the Court to resolve broad policy issues by raising considerations or ramifications not contemplated or perhaps deliberately not referred to by the parties.

15. These points transport well to these shores. As one might expect from a tool of almost universal application, there are many and varied reasons why an entity might wish to intervene, or indeed why a court might want an entity to intervene:

    15.1 *At the invitation of the court: eg* **Rogers v Merthyr Tydfil County BC** [2006] EWCA Civ 1134; [2007] 1 W.L.R. 808; [2006] All E.R. 354. A very modest personal injury claim used by the Court of Appeal as the platform for a major review of ATE insurance in such cases. [15] It should be noted that 6 years before Rogers, in **Heil v Rankin** [2000] EWCA Civ 84, [2001] QB 272 the Court of Appeal had chosen another way of polling the insurance industry. Heil involved the question whether the Court of Appeal should issue guidelines in line with a Law Commission recommendation that the level of damages for non-pecuniary loss for personal injuries should be increased. The Court selected and heard together 8 appeals covering the spectrum of personal injury damages. The Court

[14] Webster v Reproductive Health Service 492 US 490 at 522

[15] The judgment records the lengths the court went to obtain information from ATE insurers and the like, and the terms on which they intervene: "[12] … the Civil Appeals Office wrote to a number of interested parties, including other ATE insurers, to inquire whether they wished to make submissions or to intervene in the appeal. As a result of that invitation, submissions of one kind or another were made by Allianz Cornhill (Allianz), Abbey Legal Protection (Abbey), Brit Insurance Ltd (Brit), LAMP Insurance Co Ltd (LAMP), Temple Legal Protection Ltd (Temple), Keystone Legal Benefits Ltd (Keystone), and the Law Society. Brooke LJ then convened a case management conference on 23 May 2006. [13] On that occasion he decided that this matter should proceed as a second appeal as a test case, and he permitted the parties and the interveners to adduce such evidence and submissions as they thought fit. The appeal was to be by way of re-hearing. In view of the fact that the Defendant council had little interest in any wider issues, and were self-funding so far as their liability to the Claimant was concerned, he directed that the appeal should go ahead on condition that the orders as to costs in the courts below would stand in any event, and that each side should bear its own costs in the Court of Appeal (save that if the appeal was dismissed or if the Defendants wished to assert that the Appellant had secured a less advantageous result than any relevant offer, he made special provision in relation to their ability to apply for costs (up to a capped limit) in the Court of Appeal). He granted permission to the Law Society and to all the companies listed at [10], above, to intervene in the appeal. He also permitted intervention from any liability insurers who wished to intervene and who were willing to comply with the terms he set for their intervention. He adjourned further directions to the senior costs judge, who has acted as our assessor throughout."

also received submissions from entities that were loosely described in the judgment as "interested parties". These included the Association of Personal Injury Lawyers (APIL), the Association of British Insurers (ABI), Eagle Star Insurance Company, Iron Trades Insurance Company and the Forum of Insurance Lawyers (FOIL). ABI unsuccessfully sought permission to make oral submissions. The Court of Appeal indicated that it should give such instructions as it thought fit to one of the Defendants to the appeal. Lord Goldsmith QC, who would have represented the ABI, subsequently appeared for one of the Defendants. The court also received written and oral submissions from an amicus instructed by the Treasury Solicitor. The difference between the approaches of the Court of Appeal in the two cases is that Heil was a much more complex exercise factually and legally. The court chose the most efficient way of achieving a just result in the particular circumstances.

15.2 *Educating/assisting the court with new developments in the law,* eg **Shields v E Coomes (Holdings) Limited** [1978] 1 WLR 1408: the application of European law to a discrimination claim

15.3 *Protecting an industry wide interest*: industry representative groups have long acted to protect their interests by applying to intervene in appeals raising issues that affect their industry; eg **Lomas v JFB Firth Rixson Inc** [2012] EWCA Civ 419 [Lehman brothers litigation in which the International Swaps and Derivatives Association applied for and were granted leave to intervene both at first instance and in the Court of Appeal on the basis that it had a legitimate interest in the true construction of the ISDA standard terms of Agreement]

15.4 *Protecting a particular commercial/financial interest*: **Nottinghamshire County Council v Bottomley** [2010] EWCA Civ 756; [2010] Med L.R. 407 a local authority was added as a party to a high value personal injury claim in order to make representations as to the form of any settlement or judgment which was likely to significantly affect its financial liabilities to provide care for the Claimant.

15.5 *Protecting professional interests or standards*: **R (on the application of Prudential plc) v Special Commissioner of Income Tax** (see above); **Bowman v Fels**[16] [2005] EWCA Civ 226 (08 March 2005) [2005] 1 WLR 3083, [2005] 4 All ER 609 (whether certain provisions in the Proceeds of Crime Act 2002 required a lawyer acting for a client in legal proceedings who discovered or suspected anything in the proceedings that might facilitate the acquisition etc of "criminal property", to immediately notify the National Criminal Intelligence

[16] In Bowman v Fels the Bar Council, the Law Society and the National Criminal Intelligence Service ("NCIS") were granted permission to intervene. The case is notable amongst other things for the willingness of the Court to continue to hear the interveners and deal with the appeal in the public interest even though the parties to the private litigation had settled before the hearing started: see Lord Justice Brooke at [6]-[18]. The Law Society is a long-standing and respected intervener. It has a Representational Case Intervention Policy which prescribes the criteria and terms which are likely to lead to its intervention. It also maintains a modest fighting fund which is available for solicitors who meet the criteria for its Litigation Support Fund Policy. The respective policies and a list of cases in which the Law Society has intervened in the period 2003-2008 can be seen at:
http://governance.lawsociety.org.uk/corporatediary/view=viewmeeting.law?MEETINGID=4462&COMMITTEEID=11473

Service of his belief if he is to avoid being guilty of a criminal offence).

15.6 *Protecting indigent and vulnerable individuals* eg **R (on the application of Burke) v General Medical Council** [2005] EWCA Civ 1003, [2006] QB 273, [2005] 3 WLR 1132 (whether GMC guidance on the withdrawal of artificial nutrition and hydration was unlawful);[17] **EM (Lebanon) v Secretary of State for the Home Department** [2008] UK HL 64 in which the House of Lords granted the Appellant's son leave to intervene so that his position could be put independently to the Court in a case involving his mother's proposed removal.

15.7 *Protecting culture*: eg **Ghai, R (on the application of) v Newcastle City Council** [2010] EWCA Civ 59 in which the following interveners appeared: Secretary of State for Justice (Interested Party), Ramgharia Gurdwara, Hitchin, Alice Barker Welfare and Wildlife Trust, The Equality And Human Rights Commission, The Hindu Merchants Association (interveners); **E, R (on the application of) v Governing Body of JFS** [2009] UKSC 1

15.8 *Extra firepower*: eg **Richard Buxton (Solicitors) v Mills-Owens** [2010] EWCA Civ 122: the Law Society were given permission to intervene in the appeal which involved the question as to the circumstances in which a solicitor instructed in litigation could lawfully terminate his retainer prior to the conclusion of the case whilst maintaining his right to be paid for the work that he has done. As a result of the intervention the Court of Appeal received the benefit of sophisticated argument that was not presented in the court below.

15.9 *Ensuring the court is appraised of a wider picture*: eg **Houldsworth v Bridge Trustees Ltd** [2010] EWCA Civ 179; Salford **City Council v Mullen** [2010] EWCA Civ 336

Some history

The United States

16. The model of modern intervention can be found in the United States. There, intervention was built on the back of civil rights litigation. In the late 1930s the filing of amicus briefs by the Special Committee on the Bill of Rights of the American Bar Association lent the endorsement of establishment lawyers and institutions to intervention. Sometimes this involved the support of unpopular causes such as supporting the Jehovah's Witnesses' right to object to their children having to salute the American flag as part of the daily public school ritual, and unions' rights to hold public meetings.

17. The first rules governing amicus briefs became effective on 27 February 1939 and were implemented to stem the flow of telegrams, letters and petitions sent to the Court.

18. Over the ensuing decades there has been a steady increase in the number of amicus

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[17] The Secretary of State for Health, Patient Concern, Medical Ethics Alliance, Alert, the British Section of the World Federation of Doctors Who Respect Human Life, the Intensive Care Society and the Catholic Bishops Conference of England and Wales intervened. The Court of Appeal expressly referred to and dealt with the evidence and concerns of the Intensive Care Society as to the implications for its members of the declarations made in the High Court.

briefs filed. The general statistics on closer examination reveal that amicus briefs are almost invariably filed in some classes of cases, for example those in which the issues involve labour, sex discrimination, race discrimination and freedom of the press.

19. Today's rules require the length of such briefs be no more than 9000 words in a prescribed format.[18] As to the content of the amicus brief, the Supreme Court Practice (the equivalent of the White Book) suggests:

> "*The brief should analyze and balance the arguments on both sides and manifest its concern with the development of the law and not merely the result in the particular case. The brief should be moderate in tone, and in general more objective than the usual advocate's brief.*"

20. There are labour and civil rights organisations who have built up decades of experience as amici, namely the NAACP, the AFL-CIO, the ACLU, the ABA and the AMA to name a few.[19] These organisations have excellent credibility. They are the counterparts of Liberty and JUSTICE in this jurisdiction. The American experience (paralleling developments here) is for established amici to try to round up other non-parties to prepare a joint brief where practicable.

21. There are two significant differences between the process of intervention in America and here:

    21.1 in the United States the Court is not bound to read the amicus brief. "*Amici can contribute but they cannot complain*" as one judge said. Indeed the custom is for the justices' clerks to vet the briefs and only to allow those of requisite standard to go forward.

    21.2 the Solicitor General of the United States frequently intervenes in appeals to the Supreme Court. It is not unusual for his office to hear representations for and against his becoming involved as an amicus. This activity is regarded by litigants as part of the hurly-burly of litigation. The Solicitor General's office is highly regarded by the Court – thus the importance of a party securing his support.

22. Notwithstanding the extra work caused to the parties by the intervention of amici in the Supreme Court, the overall view of litigants is positive. Opposing briefs are suffered; favourable briefs are welcomed. All parties reject the view that the Court would be better off without them.

Intervention in England and Wales

23. Historically there has been a great deal more interest in the docket of the United States Supreme Court by American lawyers and the general public than by their English counterparts in relation to appeals pending in the House of Lords. For example, for many years a variety of legal publications in the United States has provided a regular

[18] An intervener is also permitted to submit an Amicus brief at the permission stage of the process i.e. when the petitioner applies to the United States Supreme Court for a writ of certiorari. Briefs of that nature of are limited to 6000 words.

[19] An idea of the organisations lodging Amicus briefs in recent cases can be seen from the counsel listings given at www.supremecourt.gov/opinions/counsellist.aspx

preview of USSC cases, and the court itself published information about forthcoming hearings.

24. Notwithstanding the historical differences, the House of Lords and the Court of Appeal have long been amenable to the intervention of statutory bodies, recognised industry groups and international bodies. Examples include interventions by statutory bodies such as the Equal Opportunities Commission: **Shields v E Coomes (Holdings) Limited** [1978] 1 WLR 1408 and the Commission for Racial Equality: **Science Research Council v Nasse** [1979] 3 WLR 762 and the United Nations High Commissioner for Refugees: **R v Home Secretary ex parte Sivakumarn** [1988] AC 958

25. Attempts to intervene by public interest entities did not fare as well. The classic example is the House of Lords' refusal of an application by the Children's Legal Centre for leave to either lodge a written case and make submissions or to instruct Counsel as amicus curiae, or to lodge only written argument in **Gillick v West Norfolk HA** [1986] 1 AC 112.

26. The issue in that appeal was whether a circular issued by the Health Authority to doctors, providing them with guidelines on the giving of contraception and abortion advice to girls under sixteen without their parents' consent was unlawful. The appeal was of significance because in the High Court Mrs Gillick's claim had been dismissed, but had been allowed by the Court of Appeal.

27. Mrs Gillick opposed the application by CLC. The Health Authority did not. The House of Lords declined the application without explanation. This drew strong academic complaint.[20] However this had little discernible impact on the superior courts' willingness to allow interventions by public interest groups in appeals concerning social/human rights issues.

28. As already stated, different considerations applied to intervention in commercial litigation. In the same year as the Gillick complaints, the House of Lords granted various non-party insurance interests leave to appear as amici curiae in **Phoenix General Insurance Co of Greece v ADAS** [1987] 2 WLR 512. The Court of Appeal had overturned a High Court decision which held that certain insurance contracts were void and unenforceable because the insurer had carried on business in Great Britain without the necessary authority of the Secretary of State. Three leading insurance organisations applied to the House of Lords for leave to appear as amici. Permission to be heard was granted by an Appeal Committee although one of the parties to the appeal did not consent to the insurers' petition. In the event the parties settled a short time before the hearing. In an article about the case[21] Donald O'May, then senior partner at Ince & Co, stated that to his knowledge the Phoenix case would have been the first time that an amicus brief from a non-government source had been permitted to be argued in the House of Lords.

Subsequent developments

[20] See "Interested Parties" Legal Action October 1985 P10; case note Carol Harlow (1986) 49 MLR 768 later repeated in "Public Law and Popular Justice" Carol Harlow (2002) 65 MLR 7.

[21] Donald O'May "Development of Amicus Curiae" (1988) 85 Law Society Gazette 3.

29. English law on public interest intervention has come a long way since Gillick. The credit for this does not lie entirely with our domestic institutions suddenly voluntarily embracing Justice O'Connor's philosophy as to the value of intervention. Developments in the European courts and the introduction of the Human Rights Act were undoubtedly responsible for the sea change that took place in the receptiveness of the superior courts in this jurisdiction to listen to outsiders. The judiciary finally accepted that it made little sense that interveners should be excluded from public interest cases in the domestic courts but given access to the proceedings if they were pursued in the ECHR.

30. In his article "*Amici Curiae: third-party inventions before the European Court of Human Rights*", an essay contributed in honour of Judge Wiarda's Presidency of the ECHR, Anthony Lester referred to amendments to the rules of the ECHR that became effective on 1 January 1983 that gave important opportunities for third parties to make written and oral submissions to the Court.[22]

31. By the time Lord Lester wrote his article in 1988 he reported that there had been nine such applications by individuals and NGOs such as JUSTICE. Five had been granted, two of which were permitted on narrower issues than those proposed by the intervener. Since then interventions have burgeoned and for a number of years both LIBERTY and JUSTICE have intervened regularly in the ECHR and have also intervened in the Court of Justice.

32. The first explicit provision concerning interventions in the House of Lords was in July 1994.[23]

33. The developments in the ECHR were noted by Lord Irvine in November 1997 when speaking in the House of Lords in answer to concerns expressed by Lord Lester as to provisions in the Human Rights Bill that might shut out intervention by public interest groups:

> *"The European Court of Human Rights rules of procedure allow non-parties such as national and international non-governmental organisations to make written submissions in the form of a brief. There is no reason why any change to primary legislation in this Bill is needed to allow the domestic courts to develop a similar practice in human rights cases, which is the answer to the noble Lord's question on how I would respond to the point that an interest group would have the right to be heard in a judicial review case under the English domestic test but that, if there was not a victim, could the individual interest group be heard on the convention point? So*

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[22] The Rule permitting intervention [22] stated: *"The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written submission within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned other than the applicant".*

[23] Direction 34 provided "*Participation in a cause as an intervener in a court below does not entitle a person to intervene in the House of Lords. Application for leave to intervene must be made by petition, together with the appropriate fee. The petition should be certified with the consent of the parties in the case. If consent is reused, the petition should be endorsed with a certificate of service on the parties. All petitions for leave to intervene, whether opposed by the parties or not, will be referred to an Appeal Committee*. In November 2000 this direction (by then 36.1) was amended to add the words: *"The petition may only be presented after the petition of appeal has been presented to the House. The petition must indicate whether leave is sought for written interventions alone, or for written and oral interventions."*

now, in its proper context, I address an answer to that question.

This is a development--that is to say, allowing third parties to intervene and be heard--which has already begun in the higher courts of this country in public law cases. Provisions as to standing are quite different. They determine who can become parties to the proceedings. The standing rule which the Bill proposes in relation to convention cases simpliciter is identical to that operated at Strasbourg; and why not? Is that not right in principle? It would not, however, prevent the acceptance by the courts in this country of non-governmental organisational briefs here any more than it does in Strasbourg.

Your Lordships' House, in its judicial capacity, has recently given leave for non-governmental organisations to intervene and file amicus briefs. It has done that in Queen v. Khan for the benefit of Liberty and it has done that in Queen v. Secretary of State for the Home Department ex parte Venables and Thompson for the benefit of Justice. So it appears to me, as at present advised, that the natural position to take is to adopt the victim test as applied by Strasbourg when complaint is made of a denial of convention rights, recognising that our courts will be ready to permit amicus written briefs from non-governmental organisations; that is to say briefs, but not to treat them as full parties." [24]

34. The contributions of interveners to the work of the House of Lords/Supreme Court was acknowledged by Lord Hoffmann in E v The Chief Constable of the Royal Ulster Constabulary [2008] UKHL 66; [2009] 1 AC 536 at 542:

> *"2. ... In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.*

35. The increasing receptiveness of the House of Lords/Supreme Court to public interest intervention has had a downstream effect. In 2008 in a helpful insider's guide, Lord Justice Brooke revealed the thinking of the Court of Appeal:

> *"... [From about 2000] the House of Lords had been showing itself willing to accept interventions in appropriate cases, and the question arose whether we should permit them in the Court of Appeal, and if so in what terms. I had not at that time encountered the practice in the Court of Appeal, but it was not completely unknown. We decided to let matters flow. We should neither encourage interventions nor discourage them. The last thing we wanted was for the procedure to be bound up in red tape. If we went down the formal route before we had had proper experience of the occasions when interventions might or might not be welcomed, we feared that we might either be unduly prescriptive or unduly relaxed in the rules we formulated. And if we said that a formal application was always necessary, it was almost inevitable that a fee*

[24] Hansard, HL Debates, 24 November 1997, col 832

for making the application would always be demanded. We hoped that we might avoid this necessity by adopting a laissez-faire approach."

36. Another welcome side-effect of these developments is a greater degree of transparency (at least in the Supreme Court). It is now possible to obtain a reasonable amount of information about forthcoming appeals in the UK Supreme Court from its website.[25] Even better, this is an on-going process. The Supreme Court intends to expand its online information to include skeleton arguments etc in pending appeals, in 2013. It is unable to do this at the moment because it is locked into a Justice wide case management system that does not have the requisite functionality, and would be difficult and very expensive to adapt. Instead the Supreme Court intends to acquire and use a system of its own by October 2013. However the issues with the existing case management system are such that it is unlikely that the Court of Appeal will be unable to follow suit. Although it operates an online case tracker, this gives no information about the facts and issues in the proceedings.

Things to watch

37. An intervener should be sensitive to the following:

37.1 Getting tactics and basics right: the Public Law Project's practical guide to third-party interventions in the Administrative Court, Michael Fordham QC 's *Ten Virtues* and Sir Henry Brooke's *Interventions in the Court of Appeal*[26] are essential reading for an intending intervener or for anyone having to deal with an intervention.[27]

37.2 Repetition, repetition, repetition.[28] An intervener would want to avoid the criticism levelled by Lord Hoffmann at the Northern Ireland Human Rights Commission in E v The Chief Constable of the Royal Ulster Constabulary [2008] UKHL 66; [2009] 1 A.C. 536 at 542:

" 3. An intervention is however of no assistance if it merely repeats points which the Appellant or Respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the Appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."

These comments were echoed in the Court of Appeal in **Aguilar Quila v**

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[25] See www.supremecourt.gov.uk/current-cases/ and then "Full case details". The issues and summaries of facts are prepared by the team of judicial assistants at the Supreme Court. After judgment has been delivered this information is removed from the website and stored on the case record (retrievable on request).

[26] Sir Henry Brooke's paper is available at http://www.publiclawproject.org.uk/documents/JRSeminarMin4_000.pdf

[27] The guide is available at www.publiclawproject.org.uk/documents/3rdPartyInterventionsGuide.pdf Michael Fordham's paper is at http://www.blackstonechambers.com/news/publications/public_interest.html

[28] 6.9.4 of the Supreme Court Practice Directions provide that written submissions by interveners " … *should avoid repeating material that is in the parties' written cases. They should concentrate on the particular points that the intervener wishes to raise and should normally not exceed 20 pages of A4 size."*

Secretary of State for the Home Department [2010] EWCA Civ 1482 where the Court said of the Asian Community Action Group, which had asked for permission to make written and oral representations:

> [*24] "... it needs to be remembered that litigation, even on issues of general importance, is not an open battleground. The court may well welcome help, such as it has had in this case, on law or, more occasionally, on fact from knowledgeable third parties. But there is no legal right to intervene and a limit to the amount of material the court can cope with from other quarters. We note with approval that in public interest litigation Treasury counsel today do not stand in the way of interventions unless they consider that there is good reason to do so. But potential interveners do need to be able to contribute something relevant that is not already before the court."*

37.3 Adducing controversial evidence: what if an intervener wants to refer to statistics and specialist information which has not been provided in the lower courts? There is no doubt that the Courts value the input of trade organisations to provide statistics and specialist information about their industries. As **Supreme Court Practice** (US)[29] says:

> *" ... the presentation of information as to how a decision one way or another will affect a person or industry differently situated than the parties is a principal and helpful function of an amicus brief."*

Although the provision of this information/evidence does not appear to have caused difficulty thus far, this is because most references are to published sources. Nonetheless care has to be taken, especially where an intervener has access to private data/information/statistics not generally available.

37.4 Raising killer points for the first time on appeal: There have been a number of instances of this happening. In **Roe v Sheffield City Council** [2003] EWCA Civ 1, Lord Justice Sedley was against the intervener stating :

> *86. Since permission to intervene was given at large, it is nevertheless relevant to consider what are and are not proper topics for such an intervention. The Secretary of State's skeleton argument declares his interest as the minister responsible for national policy initiatives concerning projects for tramways. This is fully sufficient to justify his being heard on the public policy and public objects of the legislation, and to that extent on its meaning and effect. Mr Sales' submissions on his behalf, however, have not only addressed the meaning of "level" in sections 25 and 28, which can respectably be said to come into this class, but have also for the first time raised the question whether a private law cause of action exists on breach of either section.*
>
> *87. ...I am not persuaded that this was a proper subject for the minister's intervention. Whether a private law cause of action is generated by the statute is in all relevant respects a question which arises, if at all, between Defendant and Claimant. Mr Sales' explanation - that the minister is concerned at the*

[29] *Supreme Court Practice* Stern Gressman Shapiro (9th Ed)

potential risk burden facing tramway promoters - is not in my view a relevant or sufficient basis for a public interest intervention by a government department. Private law issues frequently have knock-on effects on one area or another of economic activity, but to allow those potentially affected to intervene in the absence of some larger issue is to mix private interests with the public interest; and the two do not become segregated simply because the intervention is a surrogate intervention by a department of state. Thus, as it seems to me, neither a representative body of insurers nor the Department of Trade and Industry could expect to be allowed to intervene in a personal injury action raising a new point on liability or damages, absent some special policy element such as was present in Heil v Rankin [2001] QB 272.

Lady Justice Hale disagreed. Although the proceedings involved a private law claim, the intervener's submission that the statute might not give rise to a private cause of action fell within the context of a claim dealing with the provision by or on behalf of public authorities of services for members of the public in which there was a strong public interest. She therefore felt there was sufficient justification for the public interest intervener advancing a private law argument.

That was on 17 January 2003. In October that year Lord Justice Sedley found himself writing the lead judgment in **R (on the application of Hamilton) v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** [2003] EWCA Civ 1600 in a Court comprising judges other than those who had been with him in Roe. The same potential question arose – what does the Court do when the intervener on appeal raises a killer point? In that case Lord Justice Sedley was able to side-step the problem, but nonetheless referred to the situation as *"... a problematical question which has not yet been resolved."*

However in 2009 the Secretary of State for Work and Pensions took the bull by the horns when confronted with the High Court judgment in **Houldsworth v Bridge Trustees Ltd**. He successfully applied to intervene (as a party) in the Court of Appeal, on the basis of footing the costs bill for all parties on the indemnity basis. The Secretary of State then took over the case, appealing parts of the original order, taking points that had not been raised in the High Court and and becoming the lead Appellant.[30] None of the other parties raised the problematical question referred to by Lord Justice Sedley. The intervener's offer on costs may have assuaged such concerns.

37.5 Becoming liable for costs: Orders for costs will not normally be made in favour of or against interveners. At the top end, r 46(3) of the Supreme Court Rules prescribes:

... (3) Orders for costs will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an interveners has in substance acted as the sole or principal Appellant or Respondent).

The associated practice direction provides:

[30] Houldsworth v Bridge Trustees Ltd [2010] EWCA Civ 179 (04 March 2010). The Secretary for State became a formal party to the proceedings in the appeal: see judgment at [25]

Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the parties resulting from an intervention are costs in the appeal.[31]

However interveners should bear in mind the situation in which the United Synagogue found itself in the hard-fought litigation over the discriminatory admissions policy of the JFS School in Harrow: **E, R (on the application of) v Governing Body of JFS** [2009] UKSC 1 (14 October 2009). The case initially came before the Administrative Court by way of two applications for review: the first being in respect of JFS's and then the Admissions Panel's decision to decline the Claimant's son a place at the school on the grounds that he had insufficient status as a Jew. The protagonists were the father as Claimant, JFS as First Defendant and its admissions panel body as Second Defendant. The second application sought to review a decision of the school's adjudicator concerning JFS's admission policy. Subsequently the British Humanist Association ("BHA") applied to intervene. It was given permission to make written but not oral submissions. The United Synagogue applied and was granted permission to intervene in the Administrative Court on the basis that it would not be found liable for costs. No party challenged its intervention on that basis.

The Claimant appealed Munby J's decision. In the Court of Appeal United Synagogue maintained its status as an intervener. However it retained Lord Pannick and made the running for the Respondents. The Claimant succeeded. The Court of Appeal ordered the United Synagogue and the Secretary of State to each pay 20% of the Claimant's costs in the Court of Appeal and below. United Synagogue appealed that order, arguing that it was unfair that it should be found liable for costs in the Court of Appeal as there was no appeal against the original basis upon which it had been permitted to intervene in the case, and that in any event the order relating to the Claimant's costs in the Administrative Court was contrary to the basis upon which it had intervened in that Court.

The Supreme Court was unsympathetic to the argument that as an intervener the United Synagogue should not be liable for the Claimant's costs in the Court of Appeal. Lord Hope said at [217] "… *[*United Synagogues] *had assumed a role that went well beyond that of an intervener, the Court of Appeal cannot be faulted for finding it liable for a share of the costs in that Court."* However the Supreme Court accepted that the original protection afforded the intervener in the Administrative Court should stand.

37.6 Going off-piste: there is a fine line between taking a position that is bold, and one that is not on the same slopes. As to the former, Michael Fordham says:[32]

An intervener may be able to afford to take a brave, possibly even extreme, but principled position. This will be a calculated risk. Risk, because the point may bomb or be ignored or left open in the case at hand. Worse, it could damage the intervener's reputation with the Court and impair the judicial appetite for

[31] Direction 6.9.6

[32] See paragraphs 27 and 28 *Public Interest Intervention in the Supreme Court: Ten Virtues* (above)

interventions in future. Calculated, because there is a chance that it may help.[33]

As to the latter, in the JFS case above, BHA's argument was that JFS's admission policy breached Article 14 of the Convention and Article 2 of Protocol 1. This position was criticised by the Respondents, particularly JFS. It contended that BHA's case was completely at odds with that of the Claimant. BHA was against both racial and religious discrimination whilst the Claimant had no quarrel with religious discrimination: he wanted his son to go to a Jewish school, and furthermore "*… whereas if the BHA had its way there would be no such schools, indeed no faith schools of any kind at all*." Munby J came to the conclusion that [284]

*"Insofar as the BHA is attempting to run a case based on the Convention, it is no part of E's case. A*nd *in the circumstances there is no sufficient justification or public interest in permitting the BHA to intervene simply so that it can mount some case of its own which is largely divorced from the facts of the particular case that is before the Court and which in many ways cuts across it.*"

Alarm bells should ring if the litigation or the intervention is a vehicle for an ideology or for the pursuit of an ulterior agenda: see eg **R (on the application of Burke) v General Medical Council** (above) in which Lord Phillips MR said:

> *Had [the Claimant] been well advised he would and could have sought reassurance from the GMC as to the purport of their guidelines and from the doctors who were treating him as to the circumstances, if any, in which [his treatment] might be discontinued. .. Mr Burke did not take that course. The manner and circumstances in which these proceedings were commenced suggest that he was persuaded to advance a claim for judicial review by persons who wished to challenge aspects of the GMC Guidance which had no relevance to a man in [the Claimant's] position.*

This led to the Court drawing a distinction between the interveners, reflected in the following postscript in the judgment:

We mean no discourtesy to the other interveners when we observe that a great deal of their thoughtful and well-presented contributions falls victim to our general view that this litigation expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case.

Conclusion

[33] See eg **Ladele v London Borough of Islington** [2009] EWCA Civ 1357, [2010] WLR 955 (right of local authority to compel a designated civil partnership registrar to register civil partnerships even though the registrar objected to officiating at such registrations on the grounds of her religious beliefs). In that appeal Liberty's argument as intervener as to the construction and effect of certain applicable regulations went further than that of the local authority Respondent employer, and was accepted by the Court of Appeal.

38. It is plain that interveners are here to stay and that much has yet to be heard from them. Their contributions unquestionably make the law richer, the justice system more transparent and the courts more informed.

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