a JUSTICE report

TO ASSIST THE COURT
Third Party Interventions in the UK

Advancing access to justice, human rights and the rule of law

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INTRODUCTION

1. It is an old saying that there at least two sides to every case. A problem for the courts is what happens when there are more than two. For our system of justice is limited in two very crucial respects when it comes to the courts determining important points of law. First, the courts are not proactive. No matter how pressing the issue or uncertain the relevant law, they have no jurisdiction to hear a case unless and until one is brought before them by a party.[1] Secondly, our adversarial system means that the courts rely on the parties to bring to light not only all the essential issues in a case but also all the relevant evidence and legal argument as well.

2. There are, of course, a number of excellent reasons for these constraints, not the least of which is that the courts already have their hands full hearing disputes without needing to seek out more. But while this system works well for the most part, from time to time there emerge cases in which the adversarial contest between the parties fails to provide the court with all the information relevant to determining the issues at hand. The limited nature of the parties' interests on either side may mean that key issues go unaddressed, or that their coverage is distorted. Or it simply may be that the issues in a case are so broad and so complex that, even with the best will in the world, the parties themselves simply lack the necessary time and resources to address all the relevant points with the sufficient attention that they deserve.

3. The limitations of adversarial proceedings can arise in a case of any size but they are especially problematic when the courts are called upon to decide questions of law of major public importance, with implications going beyond the facts of the case at hand. This is especially true of those cases before our highest court, until recently the House of Lords but now the UK Supreme Court. The doctrine of precedent, especially important in common law jurisdictions, means that the decisions of the highest court do more than merely decide disputes between private individuals or determine the guilt or innocence of individuals. They decide the law of the land. Which is to say that while judges do not make the law, they are nonetheless responsible for determining how it is applied. And the way in which the law is applied has obvious implications for, among other things, the distribution of rights and freedoms throughout the UK.

4. Where cases of public importance are decided by the courts, therefore, it is surely right that the courts should not be restricted to hearing from only the parties in the case before them. And in recent years, UK courts have begun to allow *third party*

[1] The sole exception appears to be section 4 of the Judicial Committee Act 1833, enabling the Queen to refer to the Judicial Committee of the Privy Council 'for hearing or consideration any such other matters whatsoever as [Her] Majesty shall think fit; and such Committee shall thereupon hear or consider the same, and shall advise [Her] Majesty thereon in manner aforesaid'. See Patrick O'Connor QC, *The Constitutional Role of the Privy Council and the Prerogative,* JUSTICE, 2009, p17.

interventions – applications by public bodies, private individuals or companies, or NGOs to make submissions which raise some issue of public importance. Indeed, since 1996 when the House of Lords allowed the first intervention by an NGO in the case of *R v Khan*, the practice of third party interventions in the higher courts has grown considerably. There were, for instance, about 45 interventions in the Court of Appeal in 2005.[2] And in its last full year of operation, nearly of third of the cases decided by the Appeal Committee of the House of Lords involved at least one intervener.[3]

5. If this seems like rapid growth, it is worth bearing in mind that the UK started well behind most other countries. In other common law jurisdictions, such as the United States, Canada and South Africa, third party interventions before the Supreme Court have long been the norm. The first case before the US Supreme Court involving a non-governmental organisation as intervener was in 1904,[4] and amicus briefs are now filed in more than 90% of cases heard each year.[5]

6. The establishment of a Supreme Court for the UK therefore raises a number of questions concerning third party interventions, not the least of which is what is the proper role of interveners before the new Court? How should they be regulated? Are the current rules governing interventions too narrow or, as some have argued, too generous? And how far should the UK Supreme Court follow the much more expansive practice of supreme courts in other jurisdictions? Nor are these questions confined to the new Supreme Court. Many of the same issues arise in relation to interventions before the Court of Appeal and the European Court of Human Rights.

7. These are questions, too, in which JUSTICE clearly has an interest. Well before British courts began to allow third party interventions in the mid-90s, JUSTICE had established a practice of intervening in cases before the European Court of Human Rights. In 1996, JUSTICE and the Public Law Project published *A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases,* which recommended, among other things, the adoption of new procedure rules in the High Court and Court of Appeal governing third party interventions. Since 1997, when JUSTICE was first allowed to intervene in the Thompson and Venables case,[6] it

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[2] Sir Henry Brooke, 'Interventions in the Court of Appeal' (2007) *Public Law* 401-409 at 403.

[3] Of a total of 75 judgments handed down in 2008, 21 involved one or more third party interventions. For a full breakdown of statistics of interventions in House of Lords cases from 2005-2009, see page 13 below.

[4] The Chinese Charitable and Benevolent Association of New York submitted an amicus brief in *Ah How v United States*, 193 US 65. For further details, see Paul Collins, *Friends of the Supreme Court: interest groups and judicial decision making*, OUP, 2008 pp40-41. Note that in the US, amicus curiae is the established term for third party interveners – not to be confused with the more neutral role of an amicus curiae in UK courts. For further discussion see page 46 below.

[5] See Collins, ibid, p46.

[6] *R v Home Secretary ex parte T & V* [1997] 3 WLR 23.

has intervened in more than twenty cases before the House of Lords. And it intervened in the first case heard by the new UK Supreme Court in October 2009.

8. This report looks, therefore, at third party interventions in UK courts with a view to improving the current procedures and practices. It does not pretend to be neutral. Instead, it seeks to present the issues as transparently as possible, illustrating its arguments and recommendations by reference to JUSTICE's experience of third party interventions in the UK and Europe:

- Part 1 looks at the third party interventions in UK courts, their development, and the procedural rules governing them.

- Part 2 identifies key issues with the law and practice relating to third party interventions.

- Part 3 provides a brief comparative survey of third party interventions before the supreme courts of other common law jurisdictions, and discusses the future role of third party interveners before the UK Supreme Court.

The report concludes with recommendations on third party interventions for the new UK Supreme Court, the Court of Appeal and the European Court of Human Rights. In addition, the annex to the report gives details of twenty of JUSTICE's most recent interventions in British courts.

PART 1: THIRD PARTY INTERVENTIONS IN THE PUBLIC INTEREST

What is a third party intervention?

9. The origin of the term 'third party intervention' is obscure but appears to derive from ecclesiastical law, at least according to Chitty's description from 1834:[7]

> *In some Courts a third person, not originally a party to the suit or proceeding, but claiming an interest in the subject-matter, may, in order the better to protect such interest, interpose his claim, which is a proceeding termed in the Ecclesiastical Courts* intervention *.... Intervention is unknown in our Courts of Law and Equity but it is admitted in the practice of our Ecclesiastical Courts.*

An *intervener*, then, is distinct from a *party* – whether claimant or defendant, appellant or respondent, prosecutor or accused, a party has a direct stake in the outcome of the case, whereas a third party intervener does not. Equally, a third party intervener should not be confused with:

(i) an *interested party*: an interested party is someone who is identified by either the claimant or the defendant as being *directly affected* by the case.[8] An interested party may also added to the case by the court itself, where it appears to the court that it is desirable to do so in order to resolve a dispute or issue.[9]

(ii) an *amicus curiae*: from the Latin for 'friend of the court', an amicus was traditionally a neutral figure invited to assist the court with submissions on a point of law, e.g. on the interpretation of foreign law. From time to time, however, an amicus curiae might be asked to take on a more adversarial role

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[7] Chitty, *The Practice of the Law* (1834) at 497-498. See *Dalrymple v Dalrymple* (1811) 2 Hagg. Cons. Rep. 137: 'The principle of the law of intervention is, that if any third person consider that his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but has a right *to intervene* or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings'. See also Oughton, *Forms of Ecclesiastical Law*, trans. James Thomas Law (1831), Title 29: 'A third party may interpose in defence of his own interest, in every cause which has reference to his property or his person' (pp 70-71).

[8] See Civil Procedure Rules Part 54.1(2)(f), defining an 'interested party' as 'any person (other than the claimant and defendant) who is *directly affected* by [a] claim' (emphasis added). An interested party can be named as such by either the claimant (in the claim form) or the defendant (in the acknowledgment of service). In *R v Rent Officer and another ex parte Muldoon* [1996] 1 WLR 1103, the House of Lords held 'that a person is directly affected by something connotes that he is affected without the intervention of any immediate agency' (per Lord Keith).

[9] Part 19.2(2) of the Civil Procedure Rules allows the courts to add a party if it is either 'desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings' or 'if there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue'.

on behalf of an unrepresented party (e.g. a child in divorce proceedings).[10] In the United States this adversarial aspect of amici curiae became the basis for third party interventions in general. Hence, in the US and elsewhere, an amicus curiae is the established term for a third party intervener. In the UK, however, the amicus curiae (nowadays referred to as an 'advocate to the court') remains a largely non-partisan figure, appointed by the Attorney General at the behest of the court.[11]

(iii) *public interest litigation in general*: a third party intervention is often discussed in the same context as public interest litigation. However, the terms are not synonymous. Rather, interventions are one form of public interest litigation. The other, more well-known form is where an individual or NGO acts as claimant in a case, either in their own right or on behalf of some larger class or category of affected persons.[12] The common thread is that both kinds of litigation are typically justified by reference to some broader public interest in the case being determined. The distinction is whether the person or group in question brings the case themselves, or whether they intervene in an pre-existing case. In the first instance, the person or group in question will be the *claimant.* In the second instance, they will be a *third party intervener*.

10. Last but not least, it is important to distinguish between two kinds of third party interventions, depending on whether the intervener is seeking to represent the *public* interest or merely his or her own *private* interest. As should be obvious, this report is concerned only with interventions in the public interest. However, the distinction is not always an easy one to draw.

11. In most cases nowadays, someone whose private interests are directly affected by a case could reasonably expect to be either named as an interested party by the claimant or defendant, joined as a party by the court, or even apply to join the case as a party themselves. In certain cases, however, interveners in the private interest may still be found. In *Inntrepreneur Pub Company and others v Crehen*,[13] for instance, which concerned an apparent conflict between decisions of the European Commission and those of the Court of Appeal, the House of Lords allowed an

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[10] See e.g. *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266 per Salmon LJ: an amicus's role is 'to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf'. See also e.g. *Re Northern Human Rights Commission* [2002] UKHL 25 per Lord Slynn, referring to the 'non-partisan advisory function of the amicus' (para 15) and the 'necessary disinterested quality that one seeks in an amicus curiae' (para 18).

[11] Indeed, most of the representative functions previously performed by amici in English courts have now been taken over by more specialised offices, such as the appointment of litigation friends to represent children. For further discussion of amici curiae see JUSTICE/Public Law Project *A Matter of Public Interest* (1996) at pp34-37 and *Secret Evidence* (JUSTICE, 2009) at pp171-173.

[12] See *A Matter of Public Interest*, pp9-13.

[13] [2006] UKHL 38.

intervention from the credit card company Visa.[14] While the particular decisions in question concerned anti-competitive behaviour in the domestic beer market, Visa clearly had a vested interested in the broader issue, being engaged in its own battle with the Office of Fair Trading (OFT) (which had also been granted leave to intervene). In a very different context – an immigration removal decision against the appellant, a Lebanese women – the House of Lords in *EM (Lebanon) v Secretary of State for the Home Department* granted the appellant's 12-year old son leave to intervene so that representations could be made on his behalf concerning her proposed removal.[15] While both *Inntrepreneur* and *EM (Lebanon)* undoubtedly raised issues of law of public importance, the respective interventions of Visa and the appellant's son were not concerned with representing the public interest but their own personal stake in the respective outcomes. Hence, in *A Matter of Public Interest*, JUSTICE and the Public Law Project described interveners as 'own interest' interveners, rather than interventions in the public interest.[16] It noted, however:[17]

> *the elusive quality of the distinction between cases where a third party should be heard in his or her own interests and those where the court will wish to hear the intervention in the public interest. An intervener ... will almost certainly wish to urge his or her own interests: but in the case of a public interest intervener those interests will not be like those of a directly affected party who ought to be brought into the proceedings under one or other [procedural rules]. Rather, the interests in question are likely to consist of a defined, and no doubt emphatic, policy stance as regards the subject matter of the issue being considered. We would once again emphasise that it is of the greatest importance to differentiate an interest of this kind from the personal interest of a party whose pocket or liberty is affected by a decision taken by a public body.*

12. This 'elusive quality' of the distinction between public and private interveners is also evident in interventions by public bodies themselves. Government ministers[18] and

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[14] See the speech of Lord Hoffman, ibid, at para 74: 'Finally, I must mention the intervention of Visa UK Ltd, who are in dispute with the OFT on a point related to the question at issue in this appeal. Mr Stephen Morris QC, who appeared on their behalf, made some succinct submissions which I found very helpful in relation to the questions which the House has to decide. But I say nothing about whether today's decision has any application to Visa, whose position as against the [Office of Fair Trading] may well be different from that of Mr Crehan against Inntrepreneur'.

[15] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. For further details of the case and JUSTICE's intervention see page 62 below.

[16] See pp19-21.

[17] Ibid, p22.

[18] See e.g. *R (G) v London Borough of Southwark* [2009] UKHL 26 (Secretary of State for Children, Schools and Families intervening); *Birmingham City Council v Ali and others* [2009] UKHL 36 (Secretary of State for Communities and Local Government intervening); *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56 (Secretary of State for Communities and Local Government intervening*); In re Officer L (Northern Ireland)* [2007] UKHL 36 (Secretary of State for Northern Ireland intervening); *YL (Official Solicitor) v Birmingham City Council and others* [2007] UKHL 27 (Secretary of State for Constitutional Affairs intervening) and *Kay and others v Lambeth* [2006] UKHL 10 (First Secretary of State intervening).

public bodies[19] are, after all, regular interveners in cases before UK courts, and the British government is itself a occasional intervener in cases before the European Court of Human Rights in cases involving other Council of Europe countries.[20] On the one hand, public bodies have an obvious interest in cases which concern the areas of law they administer, even if they are not directly a party. The decisions of the OFT were not themselves at issue in the *Inntrepreneur* case, for instance, but it is nonetheless a key regulator in the competition field. In this sense, a public body may have an interest in the outcome of a case every bit as vested as a private company or individual. On the other hand, it is difficult to describe the interests of a government department or public body as in any sense *private*, given their public nature and – in the case of ministers – obvious democratic mandate.

13. The uncertain boundary between private and public interests was illustrated most recently in the *JFS* case,[21] involving a large number of interested parties and third party interventions from the United Synagogue and the British Humanist Association. The case concerned the admissions policy of the JFS, and in particular its decision to refuse the claimant's application on the grounds that his mother's conversion to Judaism was not recognised by the Office of the Chief Rabbi (having been carried out by a Progressive synagogue rather than an Orthodox one). The Court of Appeal allowed the appeal on the grounds that the school's policy amounted to a test of ethnicity that contravened the Race Relations Act. It also took what it acknowledged to be 'the unusual course' of requiring the United Synagogue, an intervener, to contribute to the claimant's costs. As it explained:[22]

> *This is because the United Synagogue, by its leading counsel and with the agreement of the other parties,* ***took on the principal role in opposing the claim*** *and seeking to uphold the first-instance decision.*

The issue of costs is discussed later in this report, but it is plain that the United Synagogue had a direct interest in defending the school's admission policy, based as it was on the criteria of Jewishness set by the Chief Rabbi, the head of the United Synagogue.[23] In this sense, it is more accurately understood as an 'own interest' intervention than an intervention in the public interest.

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[19] See e.g. *Secretary of State for Justice v James* [2009] UKHL 22 (Parole Board intervening); *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 (Information Commissioner intervening); *Yeda Research and Development Company Limited v Rhone-Poulenc Rorer International Holdings Inc and others* [2007] UKHL 43 (Comptroller General of Patents, Designs and Trade Marks intervening); *Riverside Housing Association Limited v White and another* [2007] UKHL 20 (The Housing Corporation intervening); *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 (Metropolitan Police intervening).

[20] See e.g. *Saadi v Italy* (2008) 24 BHRC 123.

[21] *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 626.

[22] *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 681, para 4 (emphasis added).

[23] *R (E),* Civ 626, at para 1: 'The present policy is to give priority to children who are recognized as Jewish by the Office of the Chief Rabbi (the OCR) or are following a course of conversion approved by the OCR'.

The rise of interventions in UK courts

14. Although formal provision for third party interventions in the public interest developed only late in the 20th century, the tradition of interest groups supporting litigation on matters of public importance in British courts is substantially older. The Scots case of *Sheddan v Knowles* in 1754, for instance, was one of a series of cases in which anti-slavery campaigners became actively involved in order to further the abolitionist cause. In that case, interested persons supplied 'memorials' on behalf of Sheddan, an escaped slave, that displayed 'a copiousness and variety of curious learning, ingenious reasoning and acute argumentation'.[24]

15. While public interest litigation in the UK grew considerably across the 1970s and 80s, the practice of formal interventions in the higher courts developed much more hesitantly across the same period. The earliest third party interveners were public bodies and intergovernmental organisations, rather than NGOs. For instance, the Equal Opportunities Commission (EOC) was invited to intervene in *Shields v E Coomes (Holdings) Ltd* in 1978;[25] the following year, the House of Lords allowed a joint intervention by the EOC and Commission for Racial Equality in *Science Research Council v Nasse*.[26] By 1988, the UN High Commissioner for Refugees had been granted leave to intervene in the case of *Sivakumaran*.[27] However, when the Children's Legal Centre applied in 1986 for leave to intervene in the case of *Gillick v West Norfolk & Wisbech Area Health Authority*,[28] it was 'brusquely shown the door' by the House of Lords.[29] It was not until 1995 that the House of Lords allowed the first intervention by an NGO in an appeal, permitting Liberty to make written submissions on Article 8 ECHR in the case of *R v Khan*.[30]

16. From this point onwards, however, the practice of third party interventions in the higher courts seems to have grown steadily from year to year. JUSTICE's first third party intervention in the House of Lords was in the Thompson and Venables case in 1997,[31] a detailed analysis of the UK's relevant obligations under international law,

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[24] *Sheddan v Knowles* cited in *Somerset v Stewart,* 20 *Howell's State Trials*, cols 1-6, 79-82.

[25] [1978] 1 WLR 1408.

[26] [1979] 3 WLR 762.

[27] [1988] AC 958.

[28] [1986] AC 112.

[29] Carol Harlow, 'Public Law and Popular Justice', (2002) 65 *Modern Law Review* 1-18 at 7.

[30] [1996] 3 WLR 162. See e.g. Richard Mainman ''We've Had To Raise Our Game': Liberty's Litigation Strategy Under The Human Rights Act 1998' in Halliday and Schmidt (eds) *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* at 106-107: '[I]n R v Khan, the first House of Lords intervention in 1996, Liberty's strong interest in having Article 8 of the European Convention recognised in British law, led it to present a relatively narrow argument that not only did not support the appellant's case but may actually have weakened it'.

[31] *R v Home Secretary ex parte T & V* [1997] 3 WLR 23.

including the UN Convention on the Rights of the Child.[32] In 1998, the House of Lords granted Amnesty International and Human Rights Watch leave to intervene in the Pinochet case,[33] Amnesty's intervention famously giving rise to a second House of Lords decision on the appearance of judicial bias.[34] However, the complications arising from the Pinochet case do not have appeared to have diminished the Law Lords' willingness to consider interventions. By 2000, JUSTICE had made its second intervention before the House of Lords in the Myra Hindley case,[35]and its first intervention before the Judicial Committee of the Privy Council in *Brown v Stott*.[36]

17. One straightforward explanation for the increase in third party interventions in the late 90s was the passing of the Human Rights Act 1998. Even before the Act was passed, UK courts had already begun to pay greater attention to the provisions of the European Convention on Human Rights.[37] And it is likely that UK courts were mindful of the much more generous provision for third party interventions before the European Court of Human Rights.[38] In parliamentary debates on the Act, the Lord Chancellor referred to the practice of the Strasbourg Court and suggested that third party interventions in UK courts would develop on similar terms:[39]

> *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 .... This is a development – that is to say, allowing third parties to intervene and be heard – which has already begun in the higher*

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[32] See e.g. the speech of Lord Browne-Wilkinson, ibid, 'In the face of that clear statutory provision it seems to me inescapable that, in adopting a sentence of detention during Her Majesty's pleasure, the legislature have in mind a flexible approach to child murderers which, whilst requiring regard to be had to punishment, deterrence and risk, adds an additional factor which has to be taken into account, the welfare of the child. This conclusion is reinforced by the fact that the United Kingdom (together with 186 other countries) is a party to the United Nations Convention on the Rights of the Child (1989), which was drawn to our attention in a helpful brief lodged by JUSTICE'.

[33] See *R v Bartle and the Commissioner of Police for the Metropolis ex parte Pinochet (No 1)* (1998) 3 WLR 1456 per Lord Slynn: 'Application for leave to intervene was made first by Amnesty International and others representing victims of the alleged activities. Conditional leave was given to these intervenors, subject to the parties showing cause why they should not be heard. It was ordered that submissions should so far as possible be in writing, but that, in view of the very short time available before the hearing, exceptionally leave was given to supplement those by oral submissions, subject to time limits to be fixed. At the hearing no objection was raised to Professor Brownlie, Q.C. on behalf of these intervenors being heard. Leave was also given to other intervenors to apply to put in written submissions, although an application to make oral submissions was refused. Written submissions were received on behalf of these parties'. See also *Pinochet (No 3)* (1999) 2 WLR 827.

[34] *In Re Pinochet*, (1999) 2 WLR 272.

[35] *R v Home Secretary ex parte Hindley* (2000) 2 WLR 730.

[36] [2001] 2 WLR 817, [2003] 1 AC 681. See e.g. the speech of Lord Bingham: 'In addressing this issue, I would wish to acknowledge the help which the Board has received from a written submission made, by leave of the Board, by JUSTICE'.

[37] See e.g. *Derbyshire City Council v Times Newspapers* [1993] AC 534

[38] See e.g. A Lester, 'Amici Curiae: Third Party Interventions Before The European Court of Human Rights' in Matscher and Petzold (eds) *Protecting Human Rights: The European Dimension* (1988).

[39] Lord Irvine, Hansard, HL Debates, 24 November 1997, col 832.

courts of this country in public law cases. Provisions as to standing are quite different. They determine who can become parties to the proceedings. ... [They] 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 ... 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.*

18. The increased prominence of human rights cases is only part of the explanation for the rising numbers of third party interventions, as the following breakdown of third party interventions before the House of Lords between 2005 and 2009 shows:

Third party interventions before the House of Lords between 2005 and 2009[40]

Year	Total cases[43]	Cases with interventions	Number of[41] interventions	Total no of[42] interveners	Interventions by type: Public[44]	NGO	Private
2005	73	6	10	25	3	7	0
2006	59	13	18	22	13	3	2
2007	58	19	23	40	9	9	5
2008	75	21	26	36	13	9	4
2009	45	9	12	14	6	6	0
Total	**310**	**68**	**89**	**137**	**44**	**34**	**11**

[40] Year ending July 31.

[41] Unsurprisingly, a small number of cases (15 out of 68 cases between 2005 and 2009) have involved multiple interventions. For instance, the case of *YL (Official Solicitor) v Birmingham City Council* [2007] UKHL 27 concerning the definition of public authority under the Human Rights Act drew four interventions: (i) the Secretary of State for Constitutional Affairs, (ii) JUSTICE, Liberty and BIHR, (iii) Help the Aged and the National Council on Aging, and (iv) The Disability Rights Commission. Similarly, *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, concerning the civil liability of police for failing to protect witnesses under article 2 ECHR, attracted three interventions: (i) the Secretary of State for the Home Department, (ii) JUSTICE, Mind, INQUEST and Liberty and (iii) the Equality and Human Rights Commission.

[42] Joint interventions by NGOs are not uncommon: of the 35 NGO interventions between 2005 and 2009, 13 (37%) were joint interventions. In *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 (the 'Torture Evidence' case), there were separate interventions by two different coalitions of NGOs: one joint intervention by three NGOs and another by 14 NGOs. *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26 similarly involved a joint intervention by 14 NGOs.

[43] The number of judgments handed down in the calendar year. Accordingly, the figures do not include petitions for leave to intervene, nor do they take account of the actual year in which the hearing took place (e.g. an intervention is counted in 2007 if the judgment was handed down in 2007, even if the hearing took place in 2006). Note also that the number of judgments can be misleading: a significant proportion of House of Lords involve joined cases. Even cases for which a separate judgment has been issued may be heard concurrently: for example, *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, *Secretary of State for the Home Department v MB* [2007] UKHL 46, and *Secretary of State for the Home Department v E and others* [2007] UKHL 47 were all heard together in a hearing lasting several days.

[44] Includes interventions by government ministers, the Attorney General, independent statutory bodies such as the Office of Fair Trading, the Information Commissioner, and the Equality and Human Rights Commission, and intergovernmental bodies such as the UN High Commissioner for Refugees.

The breakdown of third party interventions according to whether the interveners were public bodies, NGOs or private companies or individuals makes clear that interventions are very far from being the preserve of interest groups. Indeed, of the 89 interventions before the House of Lords between 2005 and 2009, it has been public bodies (44 interventions) and not NGOs (34 interventions) that have been the most frequent interveners. In that period, it was only in 2005 that interventions by NGOs outnumbered those of public bodies.

19. Given the much greater numbers of Court of Appeal and Administrative Court decisions, it is correspondingly much harder to determine the number of interventions before those courts. In his 2007 analysis, Sir Henry Brooke, then-Vice President of the Court of Appeal noted that since 2001 there had been 67 formal applications for leave to intervene, but noted that this was unlikely to represent the true number of interventions since it is possible (and indeed, far cheaper) to apply by way of a letter to the court.[45] Using a different measure – a study of transcripts of the court's judgments – he estimated that there were about 45 interventions in the Court of Appeal in 2005.[46] Although the Court of Appeal's annual caseload is much larger than that of the House of Lords, if one discounts appeals against sentence in the Criminal Division and looks at matters heard only by the full court, the figure of 45 interventions in 2005 seems broadly in line with the level of interventions before the House of Lords.

The procedure for intervening

20. Although the practice of third party interventions has become more established since the late 90s, provision for interventions in the various procedural rules is still highly uneven. On the one hand, the rules of the Appellate Committee of the House of Lords, the UK Supreme Court, the Privy Council and the European Court of Human Rights all make explicit provision for third party interventions. The Civil Procedure Rules governing the High Court in civil cases do not refer to interventions directly,[47] but the rules governing judicial review proceedings at least establish a procedure allowing interventions in practice. On the other hand, the Court of Appeal makes no formal provision for interventions whatsoever. This does not mean that there are no interventions in the Court of Appeal – on the contrary, it is arguably the most popular stage for interventions. However, the lack of formal provision gives rise to a number of problems, including lack of transparency and uncertainty.

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[45] Brooke, n2 above, 403.

[46] Ibid.

[47] The Practice Direction to Part 54 CPR refer to 'applications to intervene' (para 13.5) but does not otherwise use the terms 'intervener' or 'intervention'.

The Administrative Court

21. In proceedings for judicial review, 'any person' may apply to the Court for permission to either file evidence or make representations at the hearing.[48] This is done by letter to the Administrative Court office, 'identifying the claim, explaining who the applicant is and indicating why and in what form the applicant wants to participate in the hearing'.[49] There is no fee for an application to intervene.

22. The application will then be considered by a judge on the papers. There are no formal criteria by which the judge decides whether to grant leave to intervene. Instead, each application is considered on its own merits. One important factor is timing: the Civil Procedure Rules requires applications to be made 'promptly' and the practice direction further directs that applications to intervene 'must be made at the earliest reasonable opportunity, since it will usually be essential not to delay the hearing'.[50]

23. Another factor is consent. Although there is no formal requirement that a would-be intervener seek the consent of the parties before applying for leave, it is likely that the court will refuse any such application unless the applicant can show that they have at least asked the parties for their consent. By contrast, the refusal of a party to consent will rarely make a difference to the outcome of the application: it is, after all, for the court to determine the application and leave to intervene is frequently granted in the face of a party's opposition.

24. In substantive terms, however, the main informal criterion for leave appears to be whether the proposed intervention would provide the court with some information, expertise or perspective not already provided by the parties. This may take a variety of forms, whether it is evidence (e.g. empirical studies or grassroots testimony of persons liable to be affected by a particular administrative decision), submissions on the relevant law (e.g. comparative material on equivalent provisions in other jurisdictions), or the insight of an organisation with particular expertise that is relevant to the case at hand (e.g. an NGO that works with people with disabilities). Leave to intervene is unlikely to be granted if the proposed intervener seeks simply to duplicate the submissions of one of the parties.

[48] Civil Procedure Rules 54.17(1).

[49] Practice Direction to Rule 54, para 13.3.

[50] Ibid, para 13.5.

The Court of Appeal

25. Unlike Part 54 dealing with the Administrative Court, there are no formal provisions in the Civil Procedure Rules for third party interventions in the Court of Appeal.[51] Consequently, there is no consistency of practice and there at least two[52] methods by which a party can apply to intervene in the Court of Appeal: (i) a formal application using a Part 23 application notice (Form N244) or (ii) a letter to the Civil Appeals Office requesting leave to intervene.

26. An intervention by way of application notice has the advantage of formality: the information required by the court is set out clearly on the form, so the applicant knows in principle what is expected. The most obvious disadvantage is that of cost: the current fee for an application notice in the Civil Appeals Office is £200 (there is no fee for intervening in criminal matters). This is obvious a significant cost barrier to any NGO applicant. A second disadvantage is that the N244 form is plainly designed for *parties* rather than interveners: accordingly it refers to much which is irrelevant from the perspective of an intervener, and leaves out much which would be relevant (e.g. whether the intervener seeks leave to make written submissions or oral submissions, etc).[53]

27. An intervention by way of letter is, by contrast, much simpler and less costly. The only possible drawback is one of potential delay for the intervener, in the event that the letter is rejected by a member of the Civil Appeals Office who insists upon an intervention by way of a formal application notice. As Sir Henry Brooke noted:[54]

> *[I]n the absence of an express rule of practice direction similar to those in use in Pt 54 proceedings, there seems to be no consistency in the way in which applications to intervene are handled within the Office. In some cases a request by way of letter*

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[51] In his 2007 article in *Public Law*, the former Vice-President of the Court recalled a plenary meeting of the Court in about 1999 where the issue was first discussed: 'In those days 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 .... 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 for making the application would always be demanded. We hoped that we might avoid this necessity by adopting a laissez-faire approach' (Brooke, n2 above, at 401).

[52] Sir Henry Brooke suggests the existence of a third, hybrid approach: 'a party wishing to intervene may write inquiring as to how to do so. It may be advised either to follow the formal route or the informal route, depending on the person within the Office to whom the request is made' (ibid at 406).

[53] See e.g. Public Law Project, *Third Party Interventions: A Practical Guide* (2008) at 13: 'The requirement to make a formal application in this way is a slightly controversial view, as one reading of the rules would indicate that the Part 23 application procedure applies only to those who are already parties to an appeal, and not to those that are seeking permission to become interveners'.

[54] Ibid.

has been sufficient, while in other cases the formal application procedure set out in CPR Pt 23, along with the appropriate fee, has been required.

28. In either case, the applicant is expected to set out their reasons for seeking leave to intervene in the case and give details of the proposed intervention.[55] As with the Administrative Court, an applicant for leave to intervene will be expected to have sought the views of the parties on the application prior to submitting it. Failure to do so means that the court is unlikely to consider it, 'unless and until the views of the parties are obtained'.[56] Assuming that an application survives its initial sift by the Civil Appeals Office, it will be determined on the papers by a single Court of Appeal judge, and the informal criteria appear to be the same as those applied in the Administrative Court.

29. As a matter of practice, though not perhaps of law,[57] there is no requirement on an intervener to seek leave to intervene before the Court of Appeal if the intervener was previously granted leave to intervene in the case before the Administrative Court.

The House of Lords

30. The judicial business of the House of Lords has now ceased and its work transferred to the new UK Supreme Court. However, discussion of its procedures governing third party intervention is useful, particularly as they have been largely replicated by the Supreme Court.

31. The House of Lords rules governing civil and criminal appeals made specific provision for third party interveners.[58] Those wishing to intervene were required to lodge a petition for leave to intervene. There was no guidance given on the

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[55] Peculiarly, there has been apparently been a practice of the Court of Appeal to require applicants to 'explain the failure to intervene at first instance or to explain why intervention at that stage was not appropriate but is now being sought on appeal' (Brooke, ibid). This requirement is inconsistently applied – JUSTICE which has intervened in the Court of Appeal six times in the past five years has not encountered it. It is, in any event, difficult to see what purpose it serves. As Brooke notes, 'It is of course well known that the importance of a case – or even its existence – only becomes apparent after it has been heard in the Administrative Court and the judgment reported, and there may be plenty of good reasons why a public interest group becomes interested in a matter for the first time when it reaches the Court of Appeal' (ibid).

[56] Ibid, 408.

[57] See Brooke, ibid, at 402: 'Paragraph 13.5 of the Practice Direction [to Part 54] refers to 'applications to intervene', and it appears that the court refers to such applicants as 'interveners' without this word appearing formally in the Rules. It follows that an 'intervener' in the Administrative Court does not automatically fall within the definition of a 'respondent' when the matter reaches the Court of Appeal, because he was not a party to the proceedings in the lower court within the meaning of CPR rule 52/1(3)(e)(i)'. Nonetheless, the practice of the Civil Appeals Office has been to treat interveners in the High Court as parties, hence exempting them from the requirement of applying for leave at the Court of Appeal: see Public Law Project, n 53 above, at '12: Where a party has intervened already in the proceedings before the Administrative Court, they are not normally required to make any further application in order to intervene in the proceedings before the Court of Appeal (unless required to do so on account of an earlier order made by the Administrative Court). This is because the Intervener is usually treated as if it were a respondent in the appeal, and no further action need be taken in respect of the mechanics of intervention'.

[58] See e.g. Practice Directions and Standing Orders applicable to civil appeals (approved 8 October 2007), rule 37.

substance of the petition, but it was customary to give details concerning the applicant, its interest in the case, and provide summary grounds indicating the substance of the proposed intervention. It would also indicate whether the applicant was seeking leave to make written submissions or oral submissions. Prior to 2008, there was no restriction on when an application for leave to intervene could be made: in theory a petition to intervene in a case could be lodged the day before the hearing, although in practice it would be extremely unlikely for leave to be granted at such a late stage. In 2008, the rules were amended to require all petitions for leave to be submitted at least six weeks prior to the start of the hearing.[59]

32. In civil matters, the fee for a petition for leave to intervene was £570. Although there was provision for waiver of fees on grounds of hardship, NGO interveners who applied for such waiver were refused. Unlike the Court of Appeal, third party interveners in the proceedings below were not exempt from the requirement to petition for leave.[60]

33. It was also requirement that petitions to intervene had to be either endorsed with the consent of the parties or, failing that, a certificate of service together with a brief statement of reasons for their refusal of consent.[61] The Judicial Office would invariably refuse to process a petition to intervene unless and until the views of the parties were known.

34. Petitions for leave to intervene were then considered on the papers by an Appeal Committee of three Law Lords. The practice directions did not disclose the grounds on which the Committee decided petitions for leave. However, in a 2002 appeal concerning the scope of the powers of the Northern Ireland Human Rights Commission to intervene in coronial proceedings, the House of Lords took the opportunity to give its views on third party interventions generally.[62] Lord Slynn said:[63]

> *I am not troubled by the floodgates argument .... It is in the end for the court to decide these matters. The courts will only allow or invite assistance when they feel it necessary or helpful; with increasing knowledge particularly of cases in the European Court of Human Rights they may find it less necessary but this capacity to give assistance to the court is potentially valuable in achieving the purpose of the legislation.*

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[59] Ibid, rule 37.4.
[60] Ibid, rule 37.3.
[61] Ibid, rule 37.2.
[62] *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25.
[63] Para 25.

Lord Woolf concurred:[64]

> *The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.*

35. It is fair to say that, by the time the Appellate Committee delivered its last judgment in July 2009, third party interventions were no longer a 'relatively rare event' but instead had become a commonplace and unremarkable feature of House of Lords cases.[65] Nor does the House's increased familiarity with Strasbourg decisions appear to have much of an impact on the numbers of interventions in human rights cases. Instead, the House appears to have taken a fairly benign approach towards petitions to intervene, such that a well-prepared and conscientious petitioner could generally expect to be granted leave to intervene, at least by way of written submissions.[66]

36. In recent years, the grant of leave to an intervener to make oral submissions at the hearing by way of counsel – first granted to Amnesty in Pinochets Nos 1 and 3 – has also become more common but is by no means as common as leave to make written submissions. In this respect, the timing of the petition to intervene is significant. If a petition for leave to intervene were made relatively soon after the appellant was granted leave to appeal, and well before the hearing had been set down, then an intervener could have a reasonable prospect of being granted leave to make oral submissions (assuming this had been requested). An hour is the usual amount of time granted to an individual intervener – certainly no more than an hour has ever been given, and sometimes as little as half an hour.[67] The closer to the date of the hearing that leave to intervene is sought, the less likely it is that the petitioner will be granted leave to make oral submissions. The trend of allowing interventions by way

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[64] Para 32.

[65] The final judgment handed down by the Appellate Committee, *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, involved an intervention by the Society for the Protection of Unborn Children.

[66] Indeed, JUSTICE is not aware of any case in recent years in which a prospective intervener has sought leave to intervene and was refused outright.

[67] In a case involving more than one intervener, the time available to each intervener to make oral submissions at hearing becomes correspondingly less.

of oral submissions is consistent with the 1997 prediction of the Lord Chancellor during parliamentary debates on the Human Rights Act:[68]

> *As regards oral interventions by a third party, I dare say that the courts will be equally hospitable to oral interventions provided that they are brief.*

37. Where an intervener has been granted leave to make oral submissions, the importance of non-repetition of the parties' submissions is even more acute. In another case involving the Northern Ireland Human Rights Commission, Lord Hoffman was moved to offer the following observations on third party interventions before the House:[69]

> *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.*
>
> *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.*

38. The House of Lords rules also contemplated the possibility of interventions in an application for leave to appeal but only in 'exceptional circumstances'.[70] By contrast, the new UK Supreme Court rules contain no such limitation.[71]

The UK Supreme Court

39. Like the House of Lords, the procedure rules for the UK Supreme Court make provision for third party interventions:[72]

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[68] Hansard, HL Debates, 24 November 1997, col 834.

[69] *In re E (a child) (Northern Ireland)* [2008] UKHL 66.

[70] Practice Directions and Standing Orders applicable to civil appeals, n58 above, para 3.21.

(a) any official body or non-governmental organization seeking to make submissions in the public interest,

(b) any person with an interest in proceedings by way of judicial review,

(c) any person who was an intervener in the court below or whose submissions were taken into account [intervening in the application for leave to appeal],

may apply to the Court for permission to intervene in the appeal

It also makes explicit that interventions may be allowed by written submissions only or by way of both oral and written submissions.[73] For the first time, applications to the Law Lords for leave to intervene will be made using a preset application form ('SC002'), rather than the old-fashioned petition used by the House of Lords with its supplicatory tone and various arcane formulations ('the humble petition ... praying for leave sheweth .... your petitioner humbly submits ... and your petitioner will ever pray'). Although interveners in the proceedings below are not exempt from the requirement to apply for permission, they will at least have the advantage of notice requirements: appellants are required to serve copies of the application for leave to appeal on any interveners in the court below. Applications for leave to intervene will still be considered by a panel of Justices on the papers, however, and in all other respects it is expected that the practice of the Supreme Court will be the same as that before the House of Lords – for the time being at least.

40. In a consultation paper published by the Ministry of Justice in February 2009, it was proposed to raise the fee for intervening in civil cases from £570 to £800.[74] JUSTICE and Liberty made a joint response to the consultation, submitting that the £570 fee was already a 'significant hurdle' for non-governmental organisations seeking leave to intervene, and that a fee of £800 would be an even greater obstacle to potential interveners seeking leave to make submissions to the Supreme Court in the public interest.[75] In its post-consultation response, the Ministry of Justice noted these concerns and stated it would 'look at how this can be addressed by the fees order'.[76] In the Supreme Court Fees Order 2009 introduced in August 2009,[77] the fee for an

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[71] See rule 15, Supreme Court Rules 2009 (SI 2009/1603).

[72] Ibid, rule 26(1).

[73] Ibid, rule 26(2).

[74] Ministry of Justice, *Fees in the UK Supreme Court* (February 2009).

[75] Letter of JUSTICE and Liberty to the Supreme Court Implementation Team, Ministry of Justice, dated 5 May 2009.

[76] Ministry of Justice, *Fees in the UK Supreme Court: Response to consultation* (July 2009), p10.

[77] SI 2009/2131.

application for leave to intervene will be £800 in civil cases and £200 in devolution cases. However, schedule 2 of the Order now includes provision that:[78]

> *Where an application for permission to intervene in an appeal is filed by a charitable or not-for-profit organisation which seeks to make submissions in the public interest, the Chief Executive of the Supreme Court may reduce or remit the fee in that case.*

The Privy Council

41. Like the House of Lords and the UK Supreme Court, the procedure rules for the Judicial Committee of the Privy Council make explicit provision for third party interventions, either by way of written submissions only or by both oral and written submissions.[79] Applications for leave to intervene are considered on the papers by the Committee.[80] The fee for an application in a civil matter is £100.[81]

42. Interventions by NGOs before the Privy Council on matters of UK law are rare,[82] mostly due to its relatively limited jurisdiction in UK matters and its correspondingly low profile relative to the work of the House of Lords.[83] Now that jurisdiction for devolution issues has now passed from the Privy Council to the UK Supreme Court, this profile is likely to decline further. However, the Committee still hears between 55 and 65 Commonwealth cases each year, including death penalty cases from several Caribbean countries. There is, therefore, still considerable potential for third party interventions in the public interest before the Committee.

The European Court of Human Rights

43. The European Court of Human Rights has well-established practice of allowing third party interventions. Although the Court's approach was not always as generous,[84] from the early 1980s it began to accept interventions from variety of groups on a

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[78] Ibid, Schedule 2, para 9.

[79] The Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (SI 2009/224), rule 27(1).

[80] Ibid, rule 27(2).

[81] Practice Direction 7, Schedule 2.

[82] As far as we are aware, JUSTICE's intervention in *Brown v Stott* [2001] 2 WLR 817, [2003] 1 AC 681 is the only intervention by a British NGO before the Privy Council on a matter relating to UK law.

[83] Apart from devolution matters, the Privy Council hears domestic appeals from the Disciplinary Committee of the Royal College of Veterinary Surgeons; against certain Schemes of the Church Commissioners under the Pastoral Measure 1983; Appeals from the Arches Court of Canterbury and the Chancery Court of York in non-doctrinal faculty causes; Appeals from Prize Courts; Disputes under the House of Commons Disqualification Act 1975; and Appeals from the Court of Admiralty of the Cinque Ports.

[84] See A Lester 'Amici Curiae: Third Party Intervention before the ECHR' in Matscher and Petzold (eds) *Protecting Human Rights: The European Dimension* (1988), referring to the Court's refusal to allow an intervention by Liberty in *Tyrer v United Kingdom* (1978) 2 EHRR 1, despite its previous role in the case. See also JUSTICE/PLP, *A Matter of Public Interest*, n12 above, p27.

wide range of issues. One of the earliest interventions in a UK case was an intervention by the TUC in a 1981 case concerning 'closed shop' union rules.[85] Another was the Post Office Engineering Union's intervention in *Malone v United Kingdom,* concerning the government's interception of private communications.[86] Indeed, the first experience of many UK-based NGOs of third party interventions was before the European Court of Human Rights in the 1980s rather than the British courts, e.g. Interights and the International Press Institute in *Lingen v Austria,*[87] Mind in *Ashingdane v United Kingdom*,[88] JUSTICE in *Monell and Morris v United Kingdom*,[89] Amnesty International in *Soering v United Kingdom*,[90] Liberty and the Committee for the Administration of Justice in *Brannigan and McBride v United Kingdom,*[91] and Article 19 in the Spycatcher cases.[92] By the mid-90s, NGO interventions before the Court had become a common feature of Strasbourg cases: the 1996 case of *Chahal v United Kingdom* before the Grand Chamber, for instance, attracted interventions from JUSTICE, Amnesty International, Liberty, the AIRE Centre and the Joint Council for the Welfare of Immigrants.[93]

44. Prior to the adoption of Protocol 11 in 1994, there was no explicit reference to third party interventions in the Convention – interventions were instead a matter to be determined by the Court or (as appropriate) the Commission under the relevant procedural rules. Following Protocol 11, however, article 36(2) of the Convention has provided that:[94]

> *The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or* ***any person concerned who is not the applicant to submit written comments or take part in hearings****.*

45. The Rules of Court make further provision for third party interventions: the President may 'in the interests of the proper administration of justice' grant leave to intervene in any case that has been communicated to a state party, either by way of submitting written comments or 'in exceptional cases', to take part in the hearing.[95] The time

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[85] *Young James and Webster v United Kingdom* (1981) 4 EHRR 38.
[86] (1984) 7 EHRR 14.
[87] (1986) 8 EHRR 407.
[88] (1985) 7 EHRR 528.
[89] (1987) 10 EHRR 205.
[90] (1989) 11 EHRR 439.
[91] (1993) 17 EHRR 539.
[92] *Observer and The Guardian v United Kingdom* (1992) 14 EHRR 153 and *The Sunday Times v United Kingdom* (1992) 14 EHRR 229.
[93] 1996) 23 EHRR 413.
[94] Emphasis added.
[95] See rule 44.

limit for requesting leave to intervene is twelve weeks from the date of communication, or – where a case has been referred or relinquished to the Grand Chamber – twelve weeks from the latter decision. There is no prescribed form, no fee for requesting leave, and no need to seek the consent of the parties. The only requirements are that the request must be 'duly reasoned' and made in one of the official languages of the Court: French or English. The usual approach of NGOs in the UK is simply to fax a letter requesting leave to the Registry of the Court, setting out the relevant case, the NGO's interest and a brief outline of the proposed intervention.

46. Assuming that a reasoned application is made within the time limit, leave to intervene by way of written submissions is almost always granted, subject to the standard conditions that the submissions will not exceed ten pages and that the intervener will not seek to address either the facts or the merits of the case. Out of time applications are not normally successful and leave to make oral submissions at the hearing is only rarely sought and almost never granted.[96]

The European Court of Justice

47. Third party interventions before the European Court of Justice in Luxembourg are much less common than those before the European Court of Human Rights, somewhat due to the less frequent engagement of NGOs with EU law but mostly because of the extremely restrictive approach the Court itself takes toward interventions in the public interest. Interventions by NGOs are not unknown, however. In 2000, for instance, JUSTICE intervened before the Court in the case of *R v Secretary of State for the Home Department ex parte Manjit Kaur*,[97] concerning the rights of British Overseas Nationals under EU law.

48. There are essentially two routes to intervening in a case before the Court: (i) to apply to the Court directly for leave or (ii) to be granted leave by the referring national court. The Court's own rules governing interventions are extremely restrictive. Interventions are limited to 'any ... person establishing an *interest* in the result of any case submitted to the Court'.[98] Nor are interventions permitted in cases between EU

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[96] Interights was granted leave to make oral submissions at the hearing before the Grand Chamber in *Opuz v Turkey* (App No 33401/02, 9 June 2009). So far as JUSTICE is aware, this is the only case where a third party intervener has been granted leave to make oral submissions before the Court.

[97] C-192/99 (20 February 2001).

[98] Article 40(2) of the Statute of the Court of Justice (1 March 2008) (emphasis added). See e.g. *CAS Succhi di Frutta SpA v European Commission* (Case T-191/96, 20 March 1998): 'For the purposes of granting leave to intervene, the Community judicature must ascertain ... whether the applicant for such leave is directly affected by the contested decision and whether his interest in the result of the case is established. Similarly, the prospective intervener must establish a direct, existing interest in the grant of the order as sought and not an interest in relation to the pleas in law put forward'.

member states or EU institutions.[99] Interveners are further restricted to 'supporting the form of order sought by one of the parties', which would seem to foreclose any possibility that the public interest might favour a different outcome.[100] Applications for leave to intervene must be submitted within six weeks of the proceedings being notified, and must include 'a statement of the circumstances establishing the right to intervene'[101] JUSTICE's intervention in *Kaur* was via the second route: it was granted leave by the High Court in London.

[99] Ibid.

[100] Ibid.

[101] Article 93(1)(f) of the Court's procedure rules.

PART 2: ISSUES IN THIRD PARTY INTERVENTIONS

49. Third party interventions raise a number of issues, both matters of principle and in practice. These can be grouped around: (i) the *decision* of a prospective intervener to seek leave to intervene, (ii) issues associated with the *process* of applying to intervene, and (iii) the *basis* on which the court decides to allow or refuse an application to intervene.

The decision to intervene

Identifying appropriate cases

50. Although it is in the public interest and the interests of justice that the courts receive third party interventions in appropriate cases, the question of which cases are appropriate for an intervention is not always a straightforward one. The question can, moreover, be addressed from two distinct perspectives: (i) that of a prospective third party intervener and (ii) that of the court.

51. For a prospective intervener, the question of whether to intervene in any particular case depends, first of all, on knowing of its existence and the issues which it raises. And one of the central difficulties faced by NGOs that may wish to assist the courts with submissions in the public interest lies in identifying suitable cases. The great majority of organisations have no in-house legal expertise nor ready access to it on public interest issues. Even NGOs such as JUSTICE that are staffed by lawyers and are regular interveners before the courts find it difficult to identify suitable cases, relying on a combination of reported cases, media reports, word-of-mouth and (in House of Lords cases) the minutes of Appeal Committee proceedings. It is usually only after judgment has been handed down in the Administrative Court that the significance of a decision will become apparent, and even then there may be a variety of reasons why knowledge of the judgment is not disseminated further: including lack of reporting, funding delays, or alternatively a request for an expedited appeal. As one Queen's Counsel has noted:[102]

> *A major problem is that those who might have intervened do not find out about the case until too late. It is common for NGOs to face a last-minute scramble to try and get permission when the timing makes them least popular: the timetable and time-estimate are fixed by the parties, and the injection of materials and submissions presents practical difficulties.*

[102] Michael Fordham QC, ''Public interest' intervention: a practitioner's perspective' [2007] *Public Law* 410-413 at 410.

The solution, according to the writer:[103]

> *lies in devising a system for early, publicly accessible information. High Court claim forms, Court of Appeal appeal forms and House of Lords petitions should be required to include (a) a working one-sentence summary of the case and (b) an email contact address. Such a summary might read 'By judicial review, an anti-war protester claims that police action in (a) turning away and (b) forcibly returning coach passengers travelling to a demonstration at an air base, was unlawful at common law and under the Human Rights Act (Arts 5 and 10-11)'. This information could be entered onto the Court Service website with a case number, on a weekly basis. That would allow those who are interested to monitor case law which is in the pipeline and, if appropriate, request a copy of the grounds of claim/appeal.*

52. In JUSTICE's view, this is an appropriate way forward. Indeed, the Public Law Project has sought for a number of years to promote a publicly-available register of pending judicial review claims in the Administrative Court.[104] It is particularly important in public interest matters for a summary of the legal issues to be readily available from the Court as the parties themselves may be slow in responding to prospective interveners and not forthcoming with the relevant grounds.

53. Problems with lack of transparent information on upcoming cases are not limited to the UK courts. Since the time available to apply for leave to intervene in a case before the European Court of Human Rights runs from the time that a case is communicated, referred or relinquished, it is obviously important for would-be interveners to have information on communicated cases. However, it is only recently that the Court has undertaken to publish a list of communicated cases on its website. A continuing problem remains the absence of information concerning *interventions* by states parties. In 2005, for example, the UK government famously intervened in the case of *Ramzy v Netherlands* before the Grand Chamber, in a highly publicised effort to invite the Court to overturn its previous ruling in *Chahal v United Kingdom*.[105] This led a number of NGOs including JUSTICE, Liberty, the AIRE Centre, Amnesty International and Human Rights Watch to seek leave to intervene in *Ramzy* as well, in support of the *Chahal* ruling. After a number of months, however, the *Ramzy* case stalled as various matters were remitted by the Dutch courts for further

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[103] Ibid, 410-411.

[104] See e.g. n53 above, p3.

[105] This step was proposed by Tony Blair in his infamous 'rules of the game' speech following the 7/7 bombings: see Prime Minister's Press Conference, 5 August 2005: 'Now in respect of British Courts we can retest [the Chahal ruling] and, if necessary, we can amend the Human Rights Act and that covers the British Courts' interpretation of the law. There is then, of course, the possibility that there is an appeal to the European Court'. Two months later, the government announced that it would be intervening in *Ramzy v Netherlands*: see e.g. 'Ministers seek to overturn torture rule in deportation', The *Guardian*, 3 October 2005.

consideration. In the meantime, the UK government quietly applied to intervene in *Saadi v Italy* before the Grand Chamber on the same issues as those in *Ramzy*. Due to the complete lack of transparency, it was not until mid-2007 – well after the deadline had passed for interventions – that the NGO interveners in *Ramzy* learned that the UK government was seeking to undermine *Chahal* by way of its intervention in the *Saadi* case. Although the Grand Chamber ultimately refused to overturn its previous decision in *Chahal*,[106] the circumstances of the judgment in *Saadi v Italy* highlights continuing problems caused by lack of readily-available information concerning government interventions before the Strasbourg Court.

54. The difficulty for the courts lies not so much in identifying cases in which it would be appropriate to receive interventions in the public interest, but the absence of any obvious mechanism whereby it can solicit such interventions. As Lord Hope said in relation to the controversy over *Brown v Stott*,[107] 'it is not the function of the court to invite interested parties to intervene. It is up to interested parties to take the initiative'.[108] For the reasons set out above,[109] the traditional mechanism of asking the Attorney General to appoint an amicus curiae is generally inappropriate for cases in which broader public interest issues arise. Although courts have the power to join parties to disputes as appropriate, it would be similarly inappropriate for the courts to exercise their power to join a party where an intervention would suffice. In this light, the novel approach taken by the Court of Appeal in *Rogers v Merthyr Tydfil County Borough Council* represents a possible way forward. In that case involving a playground injury, the Court heard evidence to suggest that case in fact concerned the broader interests of the insurance market:[110]

> *On the basis of this evidence, Lord Justice Brooke directed that a second appeal should be permitted, and on his instructions 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 Limited ("Temple"), Keystone Legal Benefits Ltd ("Keystone"), and the Law Society.*

Identifying potential interveners is somewhat easier in a case involving commercial interests, which tend to be clearly defined and where the parties are often legally

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[106] *Saadi v Italy* (2008) 24 BHRC 123.

[107] See n82 above.

[108] Quoted in Andrea Loux, 'Writing Wrongs: Third Party Interventions Post-Incorporation' in Boyle, Loux and others (eds), *Human Rights and Scots Law* (Hart Publishing: 2002) at 335.

[109] See para 9(ii) above.

[110] [2006] EWCA Civ 1134 at para 10.

astute. Much more difficult is the task of identifying potential interveners in situations where the public interest is more contested, and where the interveners themselves may not have ready access to legal expertise to help them assist the court.

55. In a case involving environmental regulation, for instance, there may well be a range of organisations with relevant expertise whose submissions may be of assistance, but who may strongly disagree with one another on particular issues. While an open invitation is surely the most even-handed approach, the courts will no doubt be keen to avoid advertising for submissions, bearing in mind the resulting flood that might follow. At the same time, courts must also be wary of inviting only the 'usual suspects' – the established or well-known organisations in a particular field. Although we do not suggest that the courts should never invite submissions from particular organisations in appropriate cases, the potential problems with such an approach seem to us to reinforce the case for working to improve the generally poor quality of publicly-available information about pending cases before the courts.

'Adding value'

56. Generally speaking, a case can be said to be appropriate for an intervention if it (i) raises one or more issues of public importance; and (ii) there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. However, a prospective third party intervener must also address the question of the *content* of their proposed intervention – interveners cannot simply duplicate the parties' submissions and an application for permission to intervene is likely to be refused unless the applicant can show their submissions would provide the court with information, evidence, or submissions that they would not otherwise obtain. As noted above,[111] this may take a variety of forms, depending on the nature of the case at hand and the particular organisation intervening – a grassroots organisation, for instance, is likely to be well-placed to gather evidence concerning the direct impact of proposed measures; a policy organisation may be better-placed to provide submissions on policy aims and legislative history, an organisation with international expertise may be able to assist with comparative law, and so forth. At the same time, it is important for would-be interveners to remain focused on assisting the court with the issues at hand.

57. The question of how to add value becomes even more important where there is more than one potential intervener in a case. Just as Lord Hoffman referred the problem of interveners duplicating the parties' submissions in *Re E*,[112] the Court of Appeal case in *R (Burke) v General Medical Council* highlights the problems of

[111] See para 24 above.
[112] See para 37 above.

multiple interveners broadening the issues in a case.[113] That case, concerning the respondent's guidance on life-prolonging treatment, involved nine interveners and prompted the Court to note in its judgment:[114]

> *We have referred to matters put before us by three interveners: the Disability Rights Commission; the Medical Ethics Alliance and the Intensive Care Society. We mean no discourtesy to the other interveners when we observe that a great deal of their thoughtful and well-presented contributions fall 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. In so far as the interveners directly addressed the issues which we have addressed in this judgment, we hope that our conclusions are clear.*

58. One way for NGO interveners to address the potential for overlapping submissions is to consider a joint intervention, and indeed there is a healthy tradition of NGO coalitions intervening in high-profile cases.[115] The advantages of joint interventions are several: first, they allow the expertise and experience of different organisations to be combined into a single submission, reducing the burden of multiple interventions on the court; secondly, they reduce the financial burden of intervening upon each individual organisation; thirdly, the degree of consensus indicated by a broad-based NGO coalition on matters of public interest can be significant in a number of respects. The disadvantages of large NGO coalitions are perhaps less well-known: first, the larger the coalition, the more possibility there is for disagreement on matters of substance and strategy, and the greater the need for co-ordination and compromise; secondly and consequently, they are very time-consuming to organise; thirdly, it is far from clear that sheer numbers of NGOs signing up to a single intervention necessarily produces a greater impact, at least as far as British courts are concerned. More often, a joint intervention by smaller number of NGOs can be more effective than one produced by a grand coalition. For a variety of reasons, there will inevitably be cases involving multiple interveners in which joint interventions will not be appropriate. In any event, interveners will still need to co-ordinate to some degree to ensure that there is not substantial duplication of effort.

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[113] [2005] EWCA Civ 1003.

[114] Ibid, para 82 per Lord Phillips MR. The seven interveners were the Secretary of State for Health, the Official Solicitor, the Disability Rights Commission, the Catholic Bishops' Conference, the Medical Ethics Alliance, Alert, the World Federation of Doctors Who Respect Human Life, Patient Concern and the Intensive Care Society.

[115] See n42 above.

Applications for permission

The consent of the parties

59. Whether formal (House of Lords) or informal (the Administrative Court and Court of Appeal), It is a general requirement of intervening before the UK courts that the proposed intervener must approach the parties for their consent to the intervention. This is not the same as requiring the consent of the parties: in almost all cases, the courts grant leave to intervene despite at least one party having refused consent. Instead, the requirement to obtain consent is a matter of courtesy and effective case-management that allows the parties to express their views to the court on whether leave to intervene should be allowed. Although it would be an unusual set of circumstances, one supposes that an application to intervene that was opposed by both parties would have to make a relatively strong case in order to succeed.

60. The views of the parties are particularly important when it comes to the question of whether an intervener is granted leave to make oral submissions at the hearing: because time at the hearing is at a premium, the courts are more mindful of the imposition upon the parties. A party may therefore consent to an intervention by way of written submissions, but not to oral submissions.

61. In this light, the inconsistent approach of the Treasury Solicitor in consenting to interventions by NGOs is a continuing problem. The standard though not the invariable response of the Treasury Solicitor is to neither to consent to nor oppose applications to intervene from NGOs in those cases in which he represents the government: an essentially neutral response.[116] In some cases, particularly where the NGO intervener has been involved in the proceedings below, the Treasury Solicitor has consented without demur. In a number of high-profile cases, however, the Treasury Solicitor has opposed interventions by NGOs apparently as a matter of course.[117] In *Secretary of State for the Home Department v Rehman*,[118] for instance, the Treasury Solicitor refused point blank to consent to a written submission by JUSTICE without giving reasons for its refusal. Government departments are, of course, free to take their own view on the merits of interventions in particular cases but it is plainly unhelpful for a public body to take an unreasoned exception to an application by an NGO to intervene in the public interest in a way that is (i) a

[116] In some cases, the Treasury Solicitor represents more than one party to litigation: see e.g. *Roberts v Parole Board* [2005] UKHL 45 in which the Treasury Solicitor represented both the Parole Board as defendant and the Secretary of State as interested party. In such cases, there is an internal 'Chinese wall' within the Treasury Solicitor's Department in which different lawyers in different groups act for the different clients to prevent any conflict of interest. In such cases, it may often be the case that the Treasury Solicitor lawyer acting for one party will consent to the intervention, while the Treasury Solicitor acting for another party will refuse.

[117] In addition, it has sometimes proved unwilling to agree to the requested undertakings for costs: see below at para 73.

[118] [2001] UKHL 47.

departure from the government's general policy of remaining neutral on such matters; (ii) intended to diminish the likelihood that the NGO will be granted leave to intervene, either by way of written or oral submissions.

62. We do not suggest that third party interveners be released from the obligation to seek the consent of the parties. However, it would also be appropriate for the courts to be mindful of the facts that (i) NGOs often only learn of suitable cases for intervention at a relatively late stage; and (ii) parties can frequently be slow to respond to NGO requests for consent. It is therefore unhelpful if consideration of an NGO's application to intervene is extensively delayed (as was frequently the case with the Judicial Office) due to the failure of parties to respond to the NGO's request for consent. An NGO should be obliged to show that they have written to the parties for their consent, but not necessarily that they have obtained it by the time of lodgment.

Court fees

63. There is no fee to apply for leave as an intervener before the Administrative Court, the European Court of Human Rights or (if one is applying by way of letter to the court) the Court of Appeal. Before the House of Lords, however, the petition fee in civil matters was £570 and the application fee before the UK Supreme Court in civil matters is £800. In the Court of Appeal, the fee for an application for leave by way of application notice is £200.

64. There is no fee to apply for leave to intervene in any criminal matter.

65. In JUSTICE's view, the requirement to pay application fees for leave to intervene in some courts but not others and in some proceedings but not others lacks all consistency. While we are mindful of the principle of full cost recovery in civil cases, we can see no good reason why this should apply to applicants seeking leave to assist the court in the public interest. Moreover, no fee is payable for petitioners seeking leave to intervene in criminal appeals. Although we are aware that the imposition of fees in civil appeals is one way of preventing frivolous applications for leave to intervene, we are not aware of any evidence to suggest that the absence of fees to intervene in criminal appeals has led to an undue number of petitions to intervene in proceedings. We also note that no fee is payable to apply for leave to intervene in any other common law Supreme Court in either civil or criminal proceedings.

66. Therefore, while we welcome the provision in the Supreme Court rules that would allow partial or full remission of application fees where the applicant is a registered

charity or a non-for-profit organisation, we recommend the introduction of a general rule removing fees for interveners in the public interest at all stages.

The grant of permission

'The public interest'

67. As noted earlier,[119] most third party interventions in UK courts are justified as being in the public interest. In procedural terms, this is generally an implicit requirement for the grant of leave, although it has now been made explicit for interventions in the UK Supreme Court.[120] Is it possible to define the public interest? And, if not, will the new requirement add anything to the previous practice of the House of Lords? JUSTICE's 1996 report with the Public Law Project noted that:[121]

> *This report uses the term 'public interest' with reference to either a type of case or a group or organisation. There is no easy definition of what this means. In relation to cases, we have used it to refer to those which raise a serious issue which affects or may affect the public generally or a section of it.*

In the 13 years since that report was published, it has become clear that the UK courts have taken a broad and entirely pragmatic approach to interventions in the public interest. There seems little reason, then as now, to seek a formal definition of what the public interest involves. It seems likely, then, that the reference to the public interest in the Supreme Court rules does not signal a more restrictive approach but simply an expression of what has already been established. Among other things, this would be consistent with the broad approach taken by supreme courts in other common law countries towards allowing third party interventions in the public interest.[122]

Oral versus written submissions

68. In little over a decade, the grant of leave to interveners to make oral submissions at the hearing has become a regular occurrence. Nor are the reasons hard to seek. For if the purpose of interventions is to assist the court, then it is plainly more effective for the intervener's counsel to address the court in light of the issues as they have been presented at the hearing, rather than as they were framed several weeks earlier in written submissions. More problematically, however, the grant of leave to make oral

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[119] See para 10 above.

[120] See para 39 above.

[121] *A Matter of Public Interest* at pp4-5.

[122] See below pages 39-49.

submissions has had the unwelcome effect of diminishing the apparent value of written submissions. As Fordham notes:[123]

> *Written submissions are apt in practice to be ignored or diluted in their impact. A party before the court may invite specific attention to particular points made by the absent intervener, but will often stick to its own written case, particularly where there is divergence (in which case it may not wish to draw attention to what has been said). The written intervention will be trapped in time (the point at which it was lodged), and non-responsive to what has since been submitted or provided to the court, including in oral submissions or ideas and questions from the bench. Law reporters sometimes also overlook written-only intervention teams: which raises an unspoken (but real and potentially distorting) anxiety for lawyers (perhaps acting pro bono) who – perish the thought – would wish the case to appear on their CV.*

The concerns of NGOs submitting written-only interventions are less to do with CV points and more to do with having contributed significant time and resources only to apparently fail at their intended task, which is to assist the court in a matter of public interest. The sneaking suspicion of NGOs that only oral submissions are taken seriously by the court is reinforced by the Treasury Solicitor's particular opposition to oral submissions by interveners: if oral submissions are no more effective than written submissions, one may wonder why the government expends so much effort opposing the former rather than the latter?

69. The difficulty is, of course, that it will not always be proportionate for interveners to be granted leave to make oral submissions: time available at hearings is typically tight and at least one party can be expected to resist surrendering part of their time for the sake of an intervener. As Fordham notes, part of the problem is due to the lack of readily-available information concerning relevant cases generally: if NGOs had enough notice of a case, they could intervene at a sufficiently early stage in order for their involvement to be included in the listing and time estimate. Similarly, 'by ensuring that judgments and law reports record written-only submissions, the unspoken lawyers' anxiety is removed'.[124] Most of all, we agree with Fordham's suggestion that there should be:[125]

> *a presumption in favour of allowing attendance with a view to making brief oral submissions. Interveners should understand that (a) the final case management say on whether and how long to allow oral submissions lies in the hands of the*

[123] Fordham, n102 above at 411.
[124] Ibid.
[125] Ibid.

judge(s) at the hearing, and (b) the quiz show rules should apply (no deviation, repetition or hesitation). Subject to that, far better to have them there, able to assist the court if that is their wish.

Conduct of the intervention

Relationship of the intervener with the parties

70. Although the basis of third party interventions is to assist the court with submissions in the public interest, rather than simply to support one or other of the parties, this is a distinction frequently lost on the parties themselves. This is understandable up to a point. For it is in the nature of the parties to a dispute to be partisan and few interventions will benefit both parties to the same degree. Whatever the intervener's intent, it is much more likely that their submissions will give practical support to one party's case more than the other. Accordingly, claimant's lawyers are often keen for NGO interventions in their cases, inviting them to discuss strategy with interveners and co-ordinate legal submissions. (Equally, since few NGOs intervene to support the government,[126] the government rarely appears to welcome interventions in its cases).

71. This imbalance can sometimes put interveners who wish to maintain their independence from both parties in an awkward position. For it is also helpful for interveners to have information about how each party is running its case, so as to best assist the court and to maximise the effectiveness of the intervention. Just as it is not the purpose of an intervention to support a party's argument, it is also important not to undercut it inadvertently. For this reason, JUSTICE maintains a policy in third party interventions whereby it is happy to receive information from either party but will not discuss its submissions or otherwise co-ordinate its arguments with the parties.

Costs

72. Of all the issues facing a would-be intervener, the threat of costs is undoubtedly the most significant. NGO interveners are always happy to bear their own costs but an adverse costs award would be financially ruinous and even a small risk of such an order being made is likely to put an organisation off intervening in a case. In the *S and Marper* case, for instance, the Treasury Solicitor's Department successfully used the threat of adverse costs against Liberty to deter it from intervening before the

[126] But see *Brown v Stott*, n82 above, in which JUSTICE intervened to argue that the right against self-incrimination under Article 6 ECHR was not absolute and, in particular, did not exempt the owner of a car to identify its driver for the purposes of the Road Traffic Act 1988.

House of Lords in 2004, despite the fact that Liberty had been granted leave to make oral and written submissions in the case.[127] In that case, the Law Lords went on to find that the retention of the DNA of innocent people was not an interference with their right to respect for private life under Article 8. Liberty was granted leave to intervene in S and Marper's case before the European Court of Human Rights, however, and in December 2008 the Grand Chamber of the Court of Human Rights unanimously held consistently with Liberty's intervention that such DNA retention was a violation of Article 8. Had the Law Lords had the benefit of Liberty's intervention in 2004, it is possible that this may have persuaded their Lordships to reach a different conclusion, saving five years of unnecessary further litigation to Strasbourg.

73. It is standard practice of JUSTICE and other NGO interveners when seeking the consent of the other parties for leave to intervene, to request an undertaking from the parties that they will not seek costs against the intervener. In our experience, the parties have always agreed to provide such undertakings, although in certain high-profile terrorism cases the Treasury Solicitors Department only agreed to provide the undertaking after a lengthy exchange of correspondence, leading to considerable delay. Although interventions do involve some minor disbursements relating to the preparation of bundles and (in the House of Lords) bound volumes, it is generally speaking very difficult to see how a third party intervener could realistically behave in such a manner that would to put the parties to any particular cost.[128] Accordingly, the general approach of the UK courts has reflected our 1996 recommendation that:[129]

> *[b]ecause the function of a public interest intervener is to assist the court, we have reached the view that generally the intervener should not be vulnerable to any costs.*

In particular, the House of Lords practice directions were amended in 2008 to provide that 'subject to the discretion of the House', interveners bear their own costs and that 'any additional costs to the appellants and respondents resulting from an

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[127] *R v Chief Constable of South Yorkshire Police ex parte Marper* [2004] UKHL 39 at para 17 per Lord Steyn: 'Although the Appellate Committee was willing to allow Liberty to intervene in writing and orally, that did not happen. The House has, however, considered in detail the written intervention of Liberty in the Court of Appeal as well as a petition by Liberty to the House of Lords to intervene which was subsequently withdrawn'.

[128] The sole exception is where the intervener effectively stands in the shoes of one of the parties – see the discussion at paras 74-75 below.

[129] JUSTICE/Public Law Project, 'In the public interest', at p 29. See also Brooke, n2 above, at 408: 'There is no presumption that applying to intervene is risk free in terms of costs. In my experience, costs are never sought from an intervener, and an intervener never asks for his costs'.

intervention are costs in the appeal'.[130] The new Supreme Court rules similarly provide that:[131]

> *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 intervener has in substance acted as the sole or principal appellant or respondent).*

74. This latter provision appears to have been inspired by the 2006 decision of the House of Lords in *R (Barker) v London Borough of Bromley*, a case concerning the implementation of an EU directive on environmental regulation in which the First Secretary of State unsuccessfully intervened to argue that the appeal should be dismissed. Explaining the House's decision to require the Secretary of State to pay half of the appellant's costs, Lord Hope said:[132]

> *There is a difference of view as to who should pay the appellant's costs in this House. Mr Elvin reminded your Lordships that the usual practice is that an intervener pays his own costs and that any additional costs are treated as costs in the appeal. He said that the reason why the Secretary of State intervened was to assist and that he did not thereby become a party to the dispute. He submitted that costs in this House should be borne wholly by the council, as it was its decision that had led to the raising of the issue of principle. Mr Straker pointed out in reply that the council's hands were tied by the 1988 Regulations, for which the Secretary of State was responsible. He said that these costs should be paid by the Secretary of State .... There is force in the point that the Secretary of State must accept responsibility for the defect in the 1988 Regulations. There is nevertheless no doubt that the council would have had to pay the whole of the appellant's costs had the Secretary of State not intervened.* ***But the Secretary of State in his written case invited your Lordships to dismiss the appeal and joined forces with the council in arguing against the need for a reference and submitting to the Court of Justice that the classification of a decision as "development consent" depended exclusively on national law. In my opinion the effect of this intervention was that he became a party to the proceedings.*** *I would order that the appellant's costs in this House and in the European Court of Justice be paid as to one half by the council and as to the other half by the Secretary of State.*

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[130] See n70 above, paras 37.6 and 37.7.

[131] See n71 above, rule 46(3).

[132] [2006] UKHL 52 at paras 32-33 (emphasis added).

75. A similar instance of this can be found in the recent JFS case,[133] in which the United Synagogue took on the running of the respondent's case with the agreement of the parties.[134] In that case, it seems clear that the United Synagogue crossed the line from being an intervener in the public interest (if, indeed, it ever was), into standing in the shoes of the respondent. In such circumstances, assuming that NGO interveners are aware of the costs implications of acting as de facto parties, this seems a reasonable exception to the general rule that there should be no orders for costs against interveners.

[133] See page 10 above.

[134] See para 4 of the judgment, n22 above.

PART 3: SUPREME COURT INTERVENTIONS

76. All supreme courts share certain characteristics, but those of common law jurisdictions bear a particular importance. The doctrine of stare decisis means that the decisions of the court of final appeal are not merely of persuasive weight but legally binding on all lower courts. The supreme courts of common law jurisdictions therefore play a central role in shaping not only each jurisdiction's laws but its legal traditions and outlook. It is, of course, easy enough to argue that the House of Lords has for all intents and purposes performed the effective function of a supreme court for most of the UK for over century. But the symbolic value of a supreme court should not be underestimated: after all, it should not have been necessary to spend nearly £60 million if all that were at stake was a change of name.[135] It is therefore helpful to look at the traditions of third party interventions before the supreme courts of other common law jurisdictions, to see what lessons can be drawn for the new UK Supreme Court.

Other common law jurisdictions

Australia

77. The High Court of Australia is the final court of appeal in both state and federal matters. Although the jurisdiction of the Privy Council was only completely phased out in 1986, the High Court has been the effective final court on matters relating to the Australian Constitution since the 1912 decision of the Privy Council in *Colonial Sugar Refining Co v Attorney General (Commonwealth)*.[136]

78. The approach of the High Court to third party interventions has been largely ad hoc, and somewhat more limited than in the supreme courts of other common law jurisdictions, partly attributable to Australia's lack of constitutional protection for fundamental rights. Indeed, the traditional approach of the High Court was mildly hostile to third party interveners.[137] Although various states and federal courts in Australia had begun to expand the criteria for amicus interveners in the early 1990s,[138] and despite the fact that various statutory bodies (including e.g. the

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[135] Hansard, Written Answer of Lord Hunt of Kings Heath, 26 March 2008: Col WA102.

[136] [1914] AC 237.

[137] See e.g. Dixon J in *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, noting that courts 'should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, *by a very special practice*, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which are under the Constitution' (emphasis added).

[138] See e.g. *National Australian Bank v Hokit* (1995-96) 39 NSWLR 377, where the New South Wales Court of Appeal granted leave to the Consumers Federation of Australia on the grounds that it was 'a body apt to assist the Court' because of its

Australian Human Rights Commission) had the power to intervene in cases,[139] it was not until the mid-90s that the High Court itself began to expand the grounds for intervention beyond the test of strict legal interest.[140]

79. In the 1997 case of *Kruger v Commonwealth*, for instance, the Australian section of the International Commission of Jurists applied for leave to intervene before the High Court to address the constitutional validity of the Aboriginals Ordinance 1918. The court declined the application on the grounds that interveners 'must ordinarily show an interest in the subject of litigation greater than a mere desire to have a law declared in particular terms'. A would-be intervener must also show that:[141]

> *the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court would be prejudiced. Where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application.*

80. In the case of *Levy v Victoria*,[142] however, later the same year, the High Court was invited to consider whether state duck hunting regulations raised free speech implications, and consequently decided to grant leave to a number of interveners, including a number of state attorneys general and media organisations. Clarifying the distinction between amici and interveners, Chief Justice Brennan noted that although an intervener must ordinarily show an interest that would be directly affected by a decision:[143]

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experience with the issues, but imposed the condition that 'the intervention should be limited to matters of public interest not already dealt with by the parties'.

[139] See e.g. section 78 of the Judiciary Act 1903 which allows attorneys general of the state and federal governments to intervene in cases involving constitutional matters: see section 78A(1): 'The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings that relate to a matter arising under the Constitution or involving its interpretation'; section 11(1)(o) of the Australian Human Rights Commission Act 1986 allows the Commission, where it 'considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues'.

[140] See Kenny 'Interveners and Amici Curiae in the High Court' (1998) 20 Adel LR 159, 161-167.

[141] See (1996) 3 Leg Rep 14.

[142] [1997] HCA 31.

[143] Ibid. See also e.g. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. As well as this potential expansion of the category of intervener, Brennan CJ also noted that it would be prepared to consider expanding the category of amicus curiae: 'It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an *amicus* who is willing to offer assistance. All that can be said is that an *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby,

the legal interests of a person may be affected in more indirect ways than by being bound by a decision. They may be affected by operation of precedent - especially a precedent of this Court - or by the doctrine of stare decisis .... [A]n exercise of the jurisdiction conferred on this Court is not subject to appeal nor to review by any other court. As this Court's appellate jurisdiction extends to appeals, whether directly or indirectly, from all Australian courts, a decision by this Court in any case determines the law to be applied by those courts in cases that are not distinguishable. A declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party. Even more indirectly, such a declaration may affect the interests of an applicant either by its extra-curial operation or in future litigation. Ordinarily, such an indirect and contingent affection of legal interests would not support an application for leave to intervene. But where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied.

81. In the 1999 case of *Attorney-General v Breckler,*[144] in which an application to make submissions as amicus curiae was resisted not by the government but by the respondent trustees, Mr Justice Kirby criticised the High Court's failure to adapt its own procedures to make greater use of amicus interventions:[145]

This Court should adapt its procedures. It should particularly do so in constitutional cases and those where large issues of legal principle and legal policy are at stake. It should do this to ensure that its eventual opinions are informed by relevant submissions of law and by the provision of any relevant facts, not otherwise called to notice, which can be made available without procedural unfairness to a party .... With all respect to those of the contrary view, I regard the decision to exclude the submissions of such a body, when offered to this Court in an important case such as the present, as unwarranted .... Once this Court became the final court of appeal for Australia and recognised that its function involved more than the declaration of indisputable, pre-ordained law, it was necessary to adapt the Court's procedures to permit assistance to be had in some cases from a wider range of interests than those conventionally received. This is a simple truth. It is reflected, in part, in the statutory intervention by the Law Officers and by various statutory agencies. It has not yet found full acceptance in the general procedures of this Court. But in due course it must.

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provided that any cost to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the assistance that is expected'.

[144] [1999] HCA 28.

[145] Ibid, paras 104-105.

82. Ten years later in the 2009 case of *Wurridjal v The Commonwealth of Australia,*[146] Mr Justice Kirby noted the progress that had been made:[147]

> *In recent years, this Court has relaxed somewhat its earlier reluctance to permit amici curiae to intervene in proceedings. This development partly reflects the greater recognition by the Court of its normative role as a final national court. This is especially so in constitutional adjudication, such as the present proceedings.*

Canada

83. Like the High Court in Australia, the Supreme Court of Canada has been the final court of appeal in both state and federal matters since the jurisdiction of the Judicial Committee of the Privy Council was withdrawn (in Canada's case, in 1949). In 1982, the 1867 British North America Act was patriated as the Canadian Constitution, together with the freshly-established Canadian Charter of Rights and Freedoms. In addition to its existing powers of constitutional review, this gave the Supreme Court the additional power to strike down legislation as unconstitutional where it is contrary to the Charter.[148]

84. A group or individual may intervene before the Supreme Court as of right where they were granted leave to intervene in the court below. Similarly, the attorney general of any province, territory or of the federal government may intervene as of right if the court has stated a constitutional question.[149] In all other cases, an applicant may apply to the Court for leave to intervene.[150] Unlike the UK, the Supreme Court rules afford only a relatively small window for an intervener to seek leave – within four weeks of the filing of the appellant's factum (summary of the written case). Applications must identify the applicant, their interest in the proceeding, 'including any prejudice that the person interested in the proceeding would suffer if the intervention were denied'.[151] Most significantly, the Supreme

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[146] [2009] HCA 2. See also e.g. *Attorney General v Alinta Ltd* [2008] HCA 2 and esp Justice Hayne at para 61: '[t]he appointment of amici curiae provided a contradictor to the Attorney-General's arguments where none otherwise would have appeared. That was an entirely sufficient reason *(and in the present case a compelling reason) to grant the amici leave to appear*' (emphasis added).

[147] Ibid, para 261. At para 271, he noted that there was particular value in having interventions or assistance from amici on international and comparative law: 'where a court such as this is required to interpret the national constitution, particular legislation or relevant common law principles, that court should inform itself about any applicable developments of international law. *Obviously, any such investigation would preferably be performed with the assistance of the parties, interveners or amici curiae*' (emphasis added).

[148] Save where the legislation has been certified under section 33 of the Charter (the 'notwithstanding' clause), providing limited term immunisation for inconsistent legislation.

[149] Rule 61(4) of the Supreme Court Rules.

[150] Rule 55.

[151] Rule 57(1).

Court rules make explicit the requirement on interveners not to duplicate the submissions of the parties. Instead, applicants must:[152]

> *set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and* ***the reasons for believing that the submissions will be useful to the Court and different from those of the other parties****...*

As one Supreme Court Justice noted:[153]

> *The most important requirement of an intervener at the Supreme Court of Canada is that the intervener presents information, argument, or a perspective to the court that is different from that presented by the parties.*

85. Influenced among other things by the more robust American tradition of amicus interveners before the US Supreme Court, the Canadian Supreme Court had an established tradition of third party interventions even before the Charter came into effect. From 1978 until 1996, for instance, the government funded the Canadian Courts Challenge Programme – a public interest litigation programme that supported cases on an increasing range of issues, including from 1985 equality rights under the Charter, becoming the effective co-ordinating body for third party interventions. Other groups such as the Canadian Women's Legal Education and Action Fund (LEAF) were active from the outset in Charter litigation. As one academic has observed, 'third party intervention has become the norm rather than the exception in cases before the Supreme Court of Canada'. [154] Interestingly, although the Court grants permission to intervene both by way of oral and written submissions, the time limits for oral submissions are much shorter than the standard one hour granted before the House of Lords: interveners have typically only five to ten minutes to address the Supreme Court.

New Zealand

86. The New Zealand Supreme Court was established in 2004, at the same time as the jurisdiction of the Judicial Committee of the Privy Council was withdrawn. Although like the UK it lacks a written constitution, the New Zealand Bill of Rights Act 1990 gives constitutional protection to fundamental rights under NZ law.

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[152] Rule 57(2)(b) (emphasis added)

[153] J C Major, 'Interveners and the Supreme Court of Canada' (1999) *National* 27 cited in Andrea Loux, 'Hearing a 'Different Voice'': Third Party Interventions in Criminal Appeals', (2000) 53 *Current Legal Problems* at 459.

[154] Loux, ibid, at 452.

87. The Supreme Court Rules are silent on third party interventions. Nonetheless, there appears to be a healthy practice of third party interventions on public interest grounds: interveners have appeared in the NZ Supreme Court at least 16 times since 2004: including from the New Zealand Human Rights Commission,[155] the Ngati Makino Heritage Trust,[156] the International Trademark Association,[157] the New Zealand Council of Trade Unions,[158] and a joint intervention by the New Zealand Law Society and the New Zealand Bar Association.[159] The Attorney General also regularly intervenes in cases for the government.

88. It appears that the power to allow interventions is treated as part of the inherent jurisdiction of the Court to do justice. The main relevant authorities are those from the High Court and the Court of Appeal (previously NZ's highest domestic court). In *Drew v Attorney-General,*[160] Mr Justice McGrath held that an intervention should be allowed 'where the assistance likely to be offered outweighs any potential detriments to the various interests'.[161] The primary consideration appears to be whether the assistance from an intervener's submissions goes beyond the assistance that counsel from the parties can provide. In *Whangarur Whakaturia no. 4 v Warin,*[162] the Court of Appeal resolved the long-standing confusion between amici curiae and third party interveners: amici are appointed 'at the behest of the court' whereas an intervener 'enters a proceeding voluntarily because they have an interest in the case or responsibilities in the matter at issue in their own right'.[163]

South Africa

89. Unlike most other common law jurisdictions, the South African Supreme Court is the final court of appeal in non-constitutional matters only: the Constitutional Court of South Africa has final authority under the Constitution. The rules of the Constitutional Court provides that:[164]

> *any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the*

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[155] *Zaoui v Superintendent, Auckland Central Remand Prison* [2004] NZSC 22. Since 2003, the Commission has intervened before the Supreme Court on three occasions.

[156] *New Zealand Maori Council and others v Attorney General* [2008] NZSC 34.

[157] *Austin Nichols & Co v Stiching Lodestar* [2007] NZSC 103.

[158] *Bryson v Three Foot Six Limited* [2005] NZSC 54.

[159] *Chamberlains v Lai* [2006] NZSC 70.

[160] (2001) 2 NZLR 428

[161] Drew 33, 432 McGrath J for the Court

[162] [2009] NZCA 60. For a recent NZ Supreme Court case involving both third party interveners and amici, see *Ngai Tahu Properties Ltd v Central Plains Water* [2009] NZSC 24.

[163] Ibid, para 27 per Robertson J.

[164] Part V, Rule 10 (1) Rules of the Constitutional Court of South Africa

time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court.

Like the rules governing interventions before the Canadian Supreme Court, interveners must demonstrate, among other things, that their submissions do not merely duplicate those of the parties:[165]

An amicus curiae shall have the right to lodge written argument, provided that such written argument ***does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court****.*

90. Since its establishment, the Constitutional Court has received amicus interventions in a broad range of cases, ranging from submissions from the Women's Legal Centre Trust on the impact of domestic violence when construing the constitutionality of the Matrimonial Property Act,[166] to submissions from the Muslim Youth Movement of South Africa in a case involving the rules of intestate succession governing widows of polygamous marriages.[167] In the high-profile challenge to the South African government's failure to provide retro-viral medicine for patients with HIV and AIDS, the Court described the role of the amicus as being:[168]

to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, ***an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court****. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court.*

91. In *Ex parte: Institute for Security Studies: in re: State v Basson,*[169] the Court made clear that its generous policy towards amicus interveners must not be abused:[170]

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[165] Part V, Rule 10(7) (emphasis added). See e.g. *Fose v Minister of Safety and Security* CCT 14/96 for an example of refusal of leave to the Human Rights Commission on grounds that, among other things, the submission 'did not raise any substantially new contentions which might have been useful for the Court' (para 10).

[166] *Van de Merwe v Road Accident Fund and another* CCT 48/05.

[167] *Hassam v Jacobs No and others* CCT 83/08.

[168] *Re Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02, at para 5 (emphasis added).

[169] 2006 (6) SA 195 (CC)

[170] Ibid, para 11 (emphasis added). See also para 15: the court must be particularly mindful of the need to maintain equality of arms where an intervener seeks leave to intervene in criminal proceedings against the accused: 'As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person.

> ***We are mindful that in the past there has been a tendency to grant consent for the mere asking.*** *Consent should not be given as a matter of course. Parties who are requested to give consent must apply their minds to these principles. The fact that a person was admitted as an amicus in the Court below does not in itself give such a person the right to be admitted as amicus in this Court. This judgment must be regarded as a general instruction on how to prepare an application for admission as an amicus.*

United States

92. Of all the common law supreme courts, the US Supreme Court has the most long-established and robust tradition of third party interventions in the public interest. As noted earlier,[171] the practice of third party interveners in US courts grew out of the adversarial functions of amici curiae, in which bystanders would offer to provide the court with assistance on points of law. As one US professor put it, an amicus curiae was:[172]

> *A stranger who of his own motion offered his learning and advice to a court that had not indicated any need of such advice and had certainly not asked for it. And yet, even by their testy and self-important lordships of the Benches, the propriety of such volunteering was never questioned .... The amicus curiae was not a supplementary counsel for plaintiff or defendant, but a man sufficiently zealous for truth or justice to offer an unsolicited guidance to the court directly.*

By the late 19th century, the practice of various interested parties using the role of amicus to make submissions to the court had become established,[173] and the first NGO to act in this capacity before the Supreme Court was the Chinese Charitable and Benevolent Association of New York in the 1904 case of *Ah How v United States*.[174] Although the case concerned the appellant's proposed deportation to China, the Association's brief sought to place the decision in a larger context, detailing reports of abuse of Chinese immigrants at the hands of US government officials. By 1908, Louis Brandeis had submitted his now famous 'Brandeis brief' on

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Ordinarily an accused in criminal matters is entitled to a well-defined case emanating from the State. If the submissions from an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms and more importantly, what is in the interests of justice'.

[171] See para 9(ii) above.

[172] Max Radin, 'Sources of Law – New and Old', Southern California Law Review (1928) at 44.

[173] The first adversarial amicus in a US court was in the 1823 case of *Green v Biddle* 21 US 1, a claim for trespass which raised larger issues concerning the relevant law in Kentucky. Henry Clay, a former speaker of the House of Representatives, intervened as an amicus on the grounds that the dispute 'involved the rights and claims of numerous occupants of the land in Kentucky' (Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (OUP, 2008), at 17).

[174] 193 US 65.

behalf of the National Consumer's League in the case of *Muller v Oregon*,[175] 'presenting the Court with statistical evidence regarding the detrimental mental and health effects that result from women working long hours'.[176] The practice of NGO interveners making amicus submissions before the Court combined with the practice of submitting extensive background material on the broader implications of court decisions, and the modern amicus brief was born. By 1915, the NAACP had intervened before the Supreme Court in *Guinn v United States*,[177] and the ACLU intervened in 1940 in *Carlson v California*.[178]

93. The first formal rules on interveners were introduced in 1939 and have changed little since that date: a would-be intervener can obtain the consent of the parties to intervene. Failing that, the amicus can petition the court directly for leave to intervene.[179] Interveners are limited to 30 pages (not including appendices, which may be extensive). Interveners are not normally granted leave to make oral submissions at the hearing, although this may sometimes be granted with the consent of the parties.

94. Although leave to submit an amicus brief is almost always granted nowadays, the Court was not always as receptive. Following a flood of amicus briefs in the late 40s and early 50s, the Court adopted an 'unwritten policy' of denying leave to submit an amicus brief if both parties did not consent.[180] This prompted the Solicitor General to adopt his own policy of refusing consent, thereby effectively barring all unwelcome interventions. The decline was obvious: in 1949, 118 amicus briefs were filed, before the Supreme Court, whereas by 1953, only 34 briefs were, and in 1954 the Court denied all amicus motions for leave.[181] The sharp fall in interveners was criticised by members of the court, however, the Solicitor General reversed his policy in 1957. By 1961, 93% of amicus motions for leave were granted by the Court.[182]

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[175] 208 U.S. 412.

[176] Collins, n173 above, at 41: ''Brandeis's role in the case was not that of a traditional amicus curiae in that Brandeis insisted on appearing on behalf of the State of Oregon, for all intents and purposes his role was that of an amicus, as Justice Frankfurter acknowledged in 1916'.

[177] 238 U.S. 347.

[178] 310 US 106.

[179] Rule 37 of the Supreme Court rules.

[180] Collins, n173 above, at 43.

[181] Ibid. This decline led the Court to criticise the Solicitor General's approach in *On Lee v United States* (1952) 343 US 924 at 924-925: 'For the Solicitor General to withhold consent automatically in order to enable this Court to determine for itself the propriety of each application is to throw upon the Court a responsibility that the Court has put upon all litigants, including the Government, preserving to itself the right to accept an amicus brief in any case where it seems unreasonable for the litigants to have withheld consent. If all litigants were to take the position of the Solicitor General, either no amici briefs ... would be allowed, or a fair sifting process for dealing with such applications would be nullified and an undue burden cast upon the Court. Neither alternative is conducive to the wise disposition of the Court's business'.

[182] Ibid at 45.

95. Aside from the dip in the 1950s, the levels of amicus interventions in Supreme Court cases have risen consistently from decade to decade: 23.3% of cases between 1946 and 1955 involved an amicus brief; this rose to 34% between 1956 and 1965; between 1966 and 1975, there were amicus briefs in 52% of cases. By the end of the twentieth century, 'at least one amicus brief was filed in almost 90% of cases before the Court'.[183] The most common areas of amicus intervention are civil rights, economic matters and federalism. Trade associations are the most common amici, appearing in 63% cases involving an amicus brief, followed by state governments (41.5%) and public advocacy groups (38.7%).[184]

96. The value of amicus interventions is only rarely addressed by members of the Supreme Court but, as one academic has noted, the clearest evidence of their value is the fact that the Court has not sought to limit the practice:[185]

> *[T]he Court's modern rules and norms clearly allow for essentially unlimited amicus participation. For a Court facing an increasing workload, as evident in the rise of certiorari petitions that the justices must mull over each year, this suggests that the justices genuinely believe amicus briefs can aid their decision-making process. If they did not view amicus briefs as useful tools – whether to assist them in making the correct legal decision or as a means to maximise their policy preferences – they likely would continue to use formal or informal policies that limit the participation of organised interests. Simply put, the Court would likely deny permission to file amicus briefs as a means to avoid, for example, the heavy amount of paper that accompanies such filings. That the justices do not opt for such policies implies that they may legitimately benefit from the assistance of such friends of the Court.*

The more general importance of amicus interventions was explained by one Supreme Court Justice in the following terms:[186]

> *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 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.*

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[183] Ibid at 46.

[184] Ibid.

[185] Ibid.

[186] *Webster v Reproductive Health Services* (1989) 492 US 490 at 522 per O'Conner J.

97. JUSTICE has itself joined amicus briefs before the US Supreme Court on several occasions since 9/11, seeking to emphasise the importance of fundamental common law values such as habeas corpus in relation to detainees in the US 'War on Terror'. In January 2009, we intervened jointly with the Commonwealth Lawyers Association (CLA) in the case of *Al Marri* before the US Supreme Court, concerning the indefinite detention without charge of a US citizen in the Naval Brig in Charleston, South Carolina on the basis of having been declared an enemy combatant. Our intervention gave a comparative perspective on how UK law has dealt with the issue of indefinite detention. The Supreme Court set aside the judgment of the court below following President Obama's decision to transfer Al Marri to civilian custody and file criminal charges against him.

The UK Supreme Court: a fresh start, a new approach?

98. With the opening of the UK Supreme Court in October 2009, a new judicial era has commenced. It is therefore appropriate to return to the questions asked at the outset of this report: what is the proper role of interveners before the new Court? Are the current rules governing interventions too narrow or, as some have argued, too generous? And how far should the UK Supreme Court follow the more expansive practice of supreme courts in other jurisdictions?

99. First, it seems clear that the Supreme Court has a leadership role, as Lady Justice Arden has suggested:[187]

> *[I]t is worth spending a moment reflecting upon what makes a court a Supreme Court. Most importantly, it will be a final court of appeal in some area of law or other, though not necessarily in all areas of law with which it deals. Generally a Supreme Court has power to interpret a written constitution. (The United Kingdom does not of course have a single statute setting out its constitution). Often a Supreme Court also has power to determine federal questions. The new United Kingdom Supreme Court will have power to determine devolution questions, and there are some parallels between devolution questions and federal questions. If, as I suggest, a Supreme Court also has a leadership role in setting out how the law should develop, it also has a responsibility to select those cases that will enable it to set the law in a new direction.*

100. This role is threefold: first, the Supreme Court is now the final court of appeal for all questions of UK law, with the exception of criminal appeals in Scotland, EU law, and the interpretation of the ECHR. Indeed, it is debatable whether the European Court of Human Rights even has the final say on the application of Convention rights in UK

[187] 'Freedom of Expression and the role of a Supreme Court', conference address King's College, London, 31 July 2009.

law. Although the government is bound by its obligations under the Convention to give effect to the judgments of the Strasbourg Court, section 2(1) of the Human Rights Act 1998 only requires the courts to take those judgments 'into account'. While in practice the House of Lords has consistently applied the rulings of the European Court of Human Rights,[188] Parliament has nonetheless given the courts the latitude to follow a different path and this is a course left open to the Supreme Court. Secondly, as the UK's highest court, it not only establishes binding precedent for all other British courts to follow, but it also provides a model for how those other courts should conduct themselves. If, therefore, the Supreme Court elected to restrict the practice of third party interventions, this would likely be followed by other British courts. Thirdly, the Supreme Court will have not merely a substantive role in determining the law but a symbolic one also. This gives additional weight to arguments over its substantive role: if justice is not only to be done, but seen to be done, then the public perception of the country's highest court is of particular importance.

101. As we have already seen, the public interest arguments in favour of allowing third party interventions may involve a number of different justifications, but a particularly potent and controversial argument is that the courts should facilitate interventions in order to ensure a certain degree of democratic participation in their decision-making. This justification is of particular importance in jurisdictions such as Canada, South Africa and the United States where the highest court has the power to strike down legislation on the grounds that it is unconstitutional. However, it also has some force even where the highest court is not charged with this responsibility, and it is this justification that some writers have suggested risks ultimately 'undercutting [the] legitimacy' of the courts.[189] As Professor Carol Harlow argued in 2002, the rise of third party interventions in UK courts risks politicising the courts themselves:[190]

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[188] See e.g. *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 at para 98 per Lord Rodger: 'Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed'.

[189] Carol Harlow 'Public Law and Popular Justice', (2002) 65 *Modern Law Review* at 2. Professor Harlow also suggests that the regular interventions of groups such as JUSTICE and Liberty have also given rise to practical problems, providing 'information on international law or the interpretation of human rights conventions or the practice of other governments and jurisprudence of other courts, producing such a degree of overload that the courts have recently moved to curtail it'. Harlow here appears to blame interveners for the 2001 Practice Note (Citation of Cases: Restrictions and Rules) [2001] 2 All ER 510. However, any suggestion that this was a direct response to third party interventions seems impossible to sustain, not least because Harlow considerably overestimates their number. Between *R v Khan* in 1996 and 2001, the number of interventions in the House of Lords by NGOs could be counted on one hand. There certainly was an explosion in comparative material after 1998, but those were the materials cited by parties, not interveners.

[190] Ibid at 17. See also at 2: 'The political process can be compared to a freeway, to which all the citizens of a modern democracy should have access. Equally, it is a free-for-all in the sense that, within the limits of free speech, everyone should have their say. The judicial process is valued for different qualities. It is formal in character, its conclusions are – and should be – reached through an artificial method of reasoned proof based on arguments submitted by the parties to an independent and impartial judge. Its objective being primarily the protection of legal interests, it is appropriate for access to be limited to those who can show such an interest. This is, of course, a stereotype. I am suggesting, however, that if we move too far away from the stereotype, we may end by stultifying it. If we allow the campaigning style of politics to invade the legal process, we may

Using the deceptive metaphor of the court too as a political surrogate, campaigning groups are gaining entry into the legal process. In terms of my opening metaphor, the legal process is transmuting into a freeway and, unless we are much more careful, it could degenerate, as has notably occurred in America, into a free-for-all. In the present political climate, litigation is often a political tactic. It is a step in a wider political campaign, to which the actors, unremittingly adversarial, are prepared to return again and again. The battles are global and may be fought in diverse national and international forums, as with the Pinochet saga, which caught both our politicians and our judges unprepared. It has opened a crack to the international human rights lobby, which will not stop pushing until the door is wide open. 'Bringing rights home' provides further windows of opportunity.

Harlow goes on to warn that:[191]

A symbiotic relationship is developing between courts and campaigning groups in which the word 'court' assumes an older and less independent sense. As in the Pergau Dam case, courts can legitimate the political lobbying of campaigning groups at the same time as the campaigners legitimate ever deeper forays into the realm of policy and politics. Supply creates demand while demand creates supply. Fortunately the remedy is still fairly easy. It is not too late to scrutinise and limit rights of access.

102. It is, however, difficult to reconcile Professor Harlow's account of a growing relationship between courts and interveners with the actual practice of third party interventions before UK courts. Indeed, given that the majority of recent interveners before the House of Lords have been public bodies rather than NGOs,[192] any resulting symbiosis would likely be of a very different character than that predicted. It would, of course, be a 'dangerous slippage'[193] if the courts were ever to regard NGO interveners as disinterested experts rather than groups with their own interest in

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end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy'.

[191] Ibid, 17-18. See also at 10: 'Courts are not surrogate legislatures. It is not their place to make this type of policy choice nor should they attempt to mimic legislative procedures .... Intervention cannot legitimate judicial law-making'.

[192] See para 18 above.

[193] Harlow at 12-13: '[T]he first time the House of Lords accepted advice from a source other than a Crown lawyer or government agency, it was to the UN High Commissioner that they turned. It is a short step to turn to NGOs as specialist advisers on international law and practice. This is a dangerous slippage which fails entirely to take into account the real role of NGOs. Amnesty International does not aspire to the sort of neutrality on which the reputation of the International Red Cross/Crescent has traditionally been based and which is expected alike of the judge and official expert adviser. With the majority of NGOs, it defines its role in terms of *political* advocacy, its function being to act as mouthpiece for a particular viewpoint. .... This affair underlines the growing perception of NGOs as campaigning groups. It is not a happy precedent for any extensions to the intervention process'.

achieving a particular outcome, but then there is no evidence that this has ever happened. The courts do not seem to have been any illusions about the nature of NGO interveners, and they appear perfectly able to distinguish between an intervener's broader ambitions and the legal merits of their arguments, just as they are able to do in respect of the parties themselves.

103. Professor Harlow's warning about the apparently baleful influence of the 'international human rights lobby' in UK courts also bears little resemblance to the reality of NGO interventions. Indeed, one noteworthy feature of interventions before the House of Lords over the past decade is how *few* interventions have been brought by international human rights groups. Since its initial, high-profile foray in the Pinochet case in 1998, Amnesty International– the bete-noire of Harlow's article – has only intervened in the UK courts four times: in the Belmarsh case in 2004,[194] the torture evidence case in 2005,[195] *Jones v Saudi Arabia* in 2006,[196] and in the *Al Skeini* case in 2007.[197] And in only two of those cases – the Belmarsh decision and the torture evidence case – can it be said that the House of Lords reached the outcome for which Amnesty was advocating. Similarly, Human Rights Watch, the second largest human rights organisation in the world after Amnesty International and a co-intervener in the *Pinochet* case, has intervened even less than Amnesty has.[198] The battle may indeed be 'unremittingly adversarial' but, if intervention in British courts were such an effective advocacy strategy, one wonders why the largest and best-funded organisations seem to wield it so infrequently. The more prosaic reality is that there is little to be gained by an NGO intervening unless they have something to say that is likely to be *useful to the court* deciding the case. From a campaigning perspective, asking to intervene in a case for the sake of being seen to intervene will have little impact on the public and none whatsoever on the court.

104. Harlow's fear that interventions by NGOs might harm certain essential judicial qualities does not, therefore, seem particularly well-founded. Looking at the record of the final five years of the House of Lords Appellate Committee, there is no sense of the Law Lords having been flooded with interventions, nor that these have exercised any malign or undue influence on their determinations. In this context, it is notable that in its final judgment, the House of Lords granted the Society for the Protection of Unborn Children leave to intervene, but it ultimately made no difference to the outcome of its decision in the *Purdy* case.[199] As Baroness Hale noted:[200]

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[194] *A and others v Secretary of State for the Home Department (No 1)* [2004] UKHL 56.
[195] *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.
[196] [2006] UKHL 26.
[197] [2007] UKHL 26.
[198] HRW intervened before the House of Lords in the torture evidence case, *Al Skeini*, and *RB U (Algeria)* [2009] UKHL 10.
[199] [2009] UKHL 45.
[200] Ibid, para 62.

despite the skilful and obviously sincerely believed argument to the contrary on behalf of the intervener, the Director was in my view correct to concede that the right to respect for private life was engaged and that the potential for interference had to be justified under article 8(2).

105. As a regular intervener before the House of Lords and now as the first intervener before the new Supreme Court, JUSTICE is of course far from neutral concerning the merits of continuing to allow third party interventions in the public interest. Nonetheless, we trust this report has presented the law and practice of interventions in a fair and transparent manner. We are certainly not aware of any evidence to suggest that interventions have created difficulties for the courts, either in terms of principle or in practice. The number of third party interventions before the courts have certainly risen considerably in the last ten years, but there is no sense that the Law Lords have in any way struggled to cope. Instead, as the experience of the US Supreme Court shows, the rise in the number of interveners granted leave to make written or oral submissions before the House of Lords tends to suggest that the Law Lords themselves find interventions of assistance. There is, in short, no need for a fresh approach at the level of the Supreme Court. Instead, it is more important that the Court allow the permissive approach established by the House of Lords to continue.

CONCLUSION AND RECOMMENDATIONS

106. While this report identifies a number of continuing problems with the law and practice relating to third party interventions, JUSTICE believes the measured approach of the House of Lords in allowing interventions in the public interest from a broad range of groups in cases of public importance is a sound model for the UK Supreme Court to follow.

107. However, if the purpose of third party interventions is for interveners to assist the court with submissions in the public interest, then it is surely in the public interest that the rules governing interventions should not be unduly restrictive. JUSTICE therefore recommends that:

i. The Court Service increase its efforts to ensure greater transparency and information on its website concerning pending cases, so that potential interveners can identify at a sufficiently early stage cases that may be appropriate for intervention. The information should include a summary of the issues raised by the case and contact details so that prospective interveners can obtain the claim form or grounds of appeal electronically.

ii. The European Court of Human Rights should similarly identify on its website when states parties are granted leave to intervene in cases involving other Council of Europe member states.

iii. If the Treasury Solicitor's Department is to maintain its policy of neither opposing nor consenting to third party interventions, it should ensure that the policy is applied consistently. In particular, the Department should not unreasonably or instinctively oppose applications to intervene at hearing by way of oral submissions.

iv. The permission of the court should always be a requirement for a third party intervention. However, if an intervener was granted leave to intervene in the court below, there should be a presumption when leave to appeal is granted that any intervener will also be granted further leave to intervene at the same time.

v. An applicant for permission to intervene should be obliged to show that they have written to the parties for their consent. However, the courts should not refuse to consider an application for leave to intervene solely on the basis that the parties have failed to respond to the intervener's request for consent.

vi. There should be no fee for applying for leave to intervene in the public interest, regardless of the level of court at which the application is made.

vii. The courts should continue their now-established practice of allowing interventions in the public interest. However, we recommend against seeking to define 'the public interest'. If a definition is thought necessary, it should be as broad and inclusive as possible.

viii. When a court grants leave to intervene, there should be a presumption in favour of granting the intervener leave to make both written submissions and, where represented by counsel, oral submissions.

ix. The courts should maintain the general rule that interveners should bear their own costs, but should not be liable for the costs of other parties.

ANNEX: JUSTICE INTERVENTIONS 2004-2009

108. JUSTICE has a long tradition of intervening before the UK courts, the European Court of Human Rights and the European Court of Justice on matters of public importance. This annex provides details of 20 of JUSTICE's third party interventions in the higher courts since 2004.

2004

R v Special Adjudicator ex parte Ullah (2004) 2 AC 323

109. In *Ullah,* the appellant complained that his removal to Pakistan would result in a denial of his religious freedom and consequently breach his rights under Article 9 ECHR. JUSTICE was granted leave to intervene before the House of Lords by way of both written and oral submissions, making reference to a string of authorities by the European Court of Human Rights which made that rights other than Article 3 could be engaged where removal would result in a 'flagrant breach' of those rights in the country of return. As Lord Bingham noted:[201]

> *even if the legal question raised at the outset were resolved in favour of the appellants, this ruling would not prevent the removal of the appellants. To that extent the question raised is academic.* ***But it is a question of legal and practical importance. It has been fully argued, with the benefit of valuable interventions on behalf of JUSTICE****, Liberty and the Joint Council for the Welfare of Immigrants.*

The House of Lords held unanimously that the Court of Appeal erred in concluding that other Convention rights could not be engaged by immigration removal. The decision was important not only for its obvious implications in immigration and asylum cases but also for the more general principles outlined by the Law Lords concerning the relationship between the Human Rights Act and the Convention Rights.[202] JUSTICE was represented pro bono by counsel Phillip Havers QC and Shaheen Rahman.

[201] Para 5 (emphasis added)

[202] See e.g. Lord Bingham at para 20: 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.

2005

Roberts v Parole Board (2005) AC 738

110. The case of *Roberts* concerned the use of secret evidence against a prisoner in a hearing before the Parole Board and the Board's power to refuse to disclose the evidence and appoint a special advocate to represent the prisoner. JUSTICE was first granted leave to intervene before the Court of Appeal in 2004, submitting that the Parole Board had no power to adopt a procedure that prevented the appellant from being able to challenge effectively the evidence against him. Before the House of Lords, JUSTICE was granted leave to intervene by way of both oral and written submissions. A majority of the House held that the Parole Board had the implicit statutory power to appoint a special advocate to represent Roberts. The House ruled unanimously that it was too soon to say whether the proceedings would involve a breach of the procedural fairness guarantees of Article 5(4). However, a majority of the Law Lords voiced grave concerns about the potential compatibility of the special advocate procedure. As Lord Steyn noted:[203]

> *Taken as a whole, the [special advocate] procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.*

Lord Bingham's judgment in *Roberts* would prove highly influential when the House later came to consider the compatibility of using closed material and special advocates in control order proceedings in *MB* and *AF*. JUSTICE was represented pro bono by Keir Starmer QC and Eric Metcalfe.

Ramzy v Netherlands

111. In October 2005, JUSTICE and Liberty were granted permission to intervene jointly in the case of *Ramzy v Netherlands*, a Dutch case before the European Court of Human Rights involving the deportation of an Algerian national on grounds of national security. The case, which was originally expected to be heard in early 2006, was notable less for its own facts than for the fact that the UK government has intervened to argue that *Chahal v UK* (in which JUSTICE intervened in 1996) was wrongly decided. In fact, the case was delayed so long that the UK government secretly intervened in a second case before the Grand Chamber, *Saadi v Italy*, in an unsuccessful attempt to reargue *Chahal*.[204] The judgment in *Ramzy* is still pending,

[203] Para 88.

[204] See para 53 above.

although it is expected to follow the decision in *Saadi*. Rabinder Singh QC and Alex Bailin represented JUSTICE and Liberty in this case.

R v Secretary of State for the Home Department ex parte Limbeula (2006) 1 AC 369

112. *Limbuela* concerned the application of section 55 of the Nationality Immigration and Asylum Act 2002 which empowered the Secretary of State to deprive an asylum seeker of subsistence support if he considered that the asylum seeker had failed to seek asylum 'as soon as reasonably practicable' following their arrival in the UK. Unsurprisingly enough, the provision led to large numbers of destitute asylum seekers and the government argued that it was not obliged to reinstate support unless or until the destitution amounted to ill-treatment contrary to Article 3 ECHR. JUSTICE and Liberty were granted leave to make a joint intervention by way of written submissions. The House of Lords unanimously accepted our submissions (drafted by Rabinder Singh QC and Raza Husain) that the 'wait and see' approach of the government was itself contrary to Article 3.

A and others v Secretary of State for the Home Department (No 2) (2006) 2 AC 221

113. *A and others (No 2)* concerned the question whether the Special Immigration Appeals Commission could consider evidence procured by torture that had been passed to the UK by other countries. JUSTICE co-ordinated the joint intervention of the International Commission of Jurists as a whole, together with the International Bar Association and the Commonwealth Lawyers Association, who were granted leave to intervene in the case before a panel of seven Law Lords by way of oral and written submissions. The intervention included a comparative study of more than 52 jurisdictions on the issue of torture evidence. The House of Lords ruled unanimously that evidence procured by torture could never be admitted in any judicial proceedings in the UK, irrespective of where and by whom it was obtained. JUSTICE was represented pro bono by Sir Sydney Kentridge QC, Colin Nicholls QC, Timothy Otty QC, Sudanshu Swaroop, Colleen Hanley and Freshfields Bruckhaus Deringer LLP.

2006

Jones v Saudi Arabia (2007) 1 AC 270

114. At issue in *Jones* was the application of the doctrine of state immunity to a civil action for torture brought by UK nationals against the Saudi government and state officials. In a joint written intervention, JUSTICE together with Amnesty International, Interights and Redress was granted leave to intervene in the matter by way of written submission, arguing strongly that state immunity for torture was inconsistent with

the status of the prohibition of torture as a peremptory norm of international law. The House of Lords nonetheless upheld the Saudi government's immunity from suit. A further complaint to the European Court of Human Rights is now pending. Keir Starmer QC, Peter Morris, Laura Dubinsky and Bhatt Murphy solicitors represented JUSTICE and its fellow interveners pro bono in this matter.

Kay v Lambeth Borough Council (2006) 2 AC 465

115. The primary issue between the parties in *Kay* was the application of Article 8 ECHR to possession hearings involving Roma and travellers dwelling on land owned by local authorities. However, the appeals also raised the issue of whether the lower courts should be free to apply decisions of the European Court of Human Rights in circumstances where the standing House of Lords decision had clearly been overruled. JUSTICE and Liberty were granted leave to submit a joint written intervention before the House of Lords, arguing that lower courts should in certain circumstances be free to follow Strasbourg rulings in cases where the Strasbourg court expressly contradicts an earlier House of Lords precedent. Unusually, despite the fact all the parties to the litigation – the appellants, the respondents, and the First Secretary of State – favoured some relaxation of the doctrine of precedent in such cases, the House of Lords declined to permit any such exception to stare decisis.

2007

Al Skeini and others v Secretary of State for Defence (2008) 1 AC 153

116. The first of a series of cases arising from the UK involvement in the war in Iraq, the case of *Al Skeini* concerned a number of appellants whose relatives had been killed at the hands of UK occupying forces. JUSTICE was part of a coalition of eleven human rights NGOs[205] that was granted leave to intervene by way of written and oral submissions, to argue that the Human Rights Act should apply on an extra-territorial basis to the activities of UK forces in southern Iraq. The majority of the House of Lords held that the Human Rights Act applied to persons detained in UK military custody anywhere in the world, but not more broadly. The NGO coalition was represented pro bono by counsel Keir Starmer QC, Richard Hermer, Charles Banner and Azeem Suterwalla. Raju Bhatt of Bhatt Murphy Solicitors acted pro bono as solicitor for the interveners. The matter is now on appeal to the European Court of Human Rights.

[205] The coalition included JUSTICE, the AIRE Centre, Amnesty International, the Bar Human Rights Committee, British Irish Rights Watch, Interights, the Kurdish Human Rights Project, Liberty and Redress.

YL (Official Solicitor) v Birmingham City Council (2008) 1 AC 95

117. In 2002, JUSTICE intervened before the Court of Appeal in *Leonard Cheshire* to argue for a broad interpretation of the Human Rights Act, to ensure an individual was not deprived of the Act's protection simply because his or her local authority had opted to discharge its duty to arrange care (under the National Assistance Act 1948) via a contract with a private care home. The same issue arose in the House of Lords in *YL v Birmingham* and so JUSTICE intervened once more – this time jointly with Liberty and the British Institute of Human Rights – to argue for the same broad approach. Although the force of our submissions was accepted by Lord Bingham and Lady Hale, the majority upheld the narrow decision in *Leonard Cheshire* that the HRA did not apply to patients placed in private care homes by local authorities. JUSTICE, Liberty and BIHR were represented pro bono at the House of Lords hearing by Michael Fordham QC, Jessica Simor and Iain Steele.

Secretary of State for the Home Department v JJ and others (2008) 1 AC 385
MB v Secretary of State for the Home Department (2008) 1 AC 440

118. In 2006, JUSTICE was granted leave to intervene by way of written submissions in the two leading control order cases before the Court of Appeal: the first time the Court had considered the Prevention of Terrorism Act 2005. *JJ and others* concerned the issue of whether conditions imposed by way of a non-derogating control order could cumulatively breach the right to liberty contrary to Article 5 ECHR; *MB,* by contrast, concerned the compatibility of using secret evidence and special advocates in control order proceedings with the requirements of Article 6 ECHR. On appeal, JUSTICE was granted leave to intervene in both cases by way of oral and written submissions, arguing that the use of control orders – with their low standard of proof, closed proceedings and use of special advocates – represented a significant departure from established common law principles of fairness and natural justice, as well as the guarantees of a fair trial under Article 6 ECHR. We also submitted comparative material on the use of closed proceedings and special advocates in other common law jurisdictions. JUSTICE was represented pro bono by counsel Michael Fordham QC and Tom Hickman, and Clifford Chance LLP.

Al Jedda v Secretary of State for Defence (2008) 1 AC 332

119. As with *Roberts, MB* and *JJ*, JUSTICE's intervention before the House of Lords in *Al Jedda* followed on from its earlier intervention in the proceedings before the Court of Appeal. Like *Al Skeini*, the case arose from the UK occupation of southern Iraq. The appellant was a dual UK/Iraqi national detained by British forces in Basra pursuant to an internment power under UN Security Council resolution 1546. Before the House of Lords, JUSTICE and Liberty were granted leave to intervene jointly by way of

written and oral submissions. We were successful in our core argument that the interpretation of the UK's obligations under UN Security Council resolutions did not take place in a vacuum but had to be placed in the context of its other obligations, including those concerning fundamental rights. The matter is now on appeal to the European Court of Human Rights where we have once again been granted leave to intervene. JUSTICE was represented pro bono before the House of Lords by counsel Professor James Crawford SC and Shaheed Fatima, and Herbert Smith LLP.

2008

Norris v United States (2008) 1 AC 920

120. The first appeal under the 2003 UK-US Extradition Treaty to reach the House of Lords, *Norris* concerned the proposed extradition of the appellant on charges of price-fixing. At issue was the 'dual criminality' requirement, which prevents a person being extradited for conduct which is not criminal in the UK. In this case, the US argued that Mr Norris's alleged price-fixing activities amounted to the long-established common law offence of conspiracy to defraud. JUSTICE was granted leave to intervene by way of written submissions, arguing that the proposed extension of the common law to cover conduct not previously recognised as criminal was a breach of the fundamental right to certainty before the law. The House of Lords unanimously agreed with these submissions. JUSTICE was represented pro bono in the intervention by Tim Owen QC, Duncan Penny, Kieron Beal and Dechert LLP.

Chief Constable of Hertfordshire v Van Colle (2009) 1 AC 225
Savage v South Essex NHS Trust (2009) 1 AC 681

121. Originally listed as joined appeals, the cases of *Van Colle* and *Savage* both concerned the liability of public bodies under Article 2 ECHR to take operational measures to protect the lives of those within their custody – in the case of *Van Colle,* the failure of the police to take steps to protect the life of the witness following numerous death threats made by the chief suspect in a burglary; in the case of *Savage*, a woman detained in a mental health facility. In a joint intervention with Mind, Inquest and Liberty, JUSTICE was granted leave to intervene by way of both oral and written submissions, focusing on the positive obligations of police and public authorities to protect individuals from real and immediate risks. We were represented pro bono by Dinah Rose QC, Paul Bowen, Richard Hermer QC, Alison Gerry and Bhatt Murphy solicitors.

R (Corner House and CAAT) v Serious Fraud Office and BAE Systems (2008) 3 WLR 568

122. Following the appellants' successful judicial review of the decision of the Serious Fraud Office in December 2006 to drop its criminal investigation of dealings between BAE Systems plc and the Saudi government (on the basis that it was a 'successful attempt by a foreign government to pervert the course of justice in the United Kingdom'), the Director of the SFO appealed the Divisional Court's ruling to the House of Lords. Although JUSTICE would not normally seek leave to intervene in a case run by another NGO, it was apparent that the case raised much broader issues of public importance. JUSTICE was granted leave to intervene by way of written submissions focusing on the importance of upholding the rule of law in the exercise of prosecutorial discretion, as well as the role of the OECD Anti-Bribery Convention in exercising that discretion. The House of Lords nonetheless held that the SFO's decision was valid. JUSTICE was represented pro bono by counsel Nigel Pleming QC, Tom de la Mare, Shaheed Fatima and Mayer Brown International LLP.

EM (Lebanon) v Secretary of State for the Home Department (2008) 3 WLR 931

123. Following JUSTICE's successful intervention in *Ullah v Special Adjudicator* before the House of Lords,[206] the concept of 'flagrant breach' was subsequently narrowed by decisions of lower courts. In 2006, the Court of Appeal held that the removal of the appellant – who would lose custody of her son if removed to Lebanon, due to the dictates of Sharia law in Lebanese family cases which awards custody automatically to the father – would not involve a 'flagrant breach' of her right to family life under Article 8 ECHR. JUSTICE and Liberty, who each intervened separately in *Ullah*, were granted leave to make a joint intervention by way of oral and written submissions in *EM (Lebanon)*, arguing that the concept of a 'flagrant breach' of a Convention right should not be narrowly understood. The House of Lords agreed and unanimously reversed the Court of Appeal ruling. JUSTICE and Liberty were represented pro bono by Rabinder Singh QC, Raza Husain and Freshfields Bruckhaus Deringer LLP.

2009

RB and U (Algeria) v Secretary of State for the Home Department; Secretary of State for the Home Department v OO (Jordan) (2009) 2 WLR 512

124. In a joint intervention with Human Rights Watch in October 2008, JUSTICE intervened in two cases heard consecutively by the House of Lords concerning assurances given by the Algerian and Jordanian governments that suspects deported from the UK on national security grounds would not be ill-treated. Granted leave to

[206] See para 109 above.

intervene by way of both written and oral submissions, JUSTICE argued that reliance on the assurances was fundamentally unsound given the well-established reputation of both countries for using torture, as well as that it would breach Article 3 ECHR to use closed proceedings to determine the risk of ill-treatment on return. The House of Lords rejected these arguments in its February 2009 judgment. However, both cases are now on appeal to the European Court of Human Rights. JUSTICE and Human Rights Watch were represented pro bono by Lord Pannick QC, Helen Mountfield, Tom Hickman and Herbert Smith LLP.

A and others v United Kingdom (Grand Chamber, 19 February 2009)

125. In a judgment that later proved to have major consequences not only for Special Immigration Appeals Commission (SIAC) cases but for control orders and other proceedings involving secret evidence, the Grand Chamber of the European Court of Human Rights delivered its ruling in *A and others v United Kingdom* in February 2009. One of the central issues was whether the use of closed proceedings and special advocates before SIAC constituted a violation of the applicants' rights. JUSTICE was granted leave to intervene, arguing that the use of special advocates was unable to ameliorate the dramatic unfairness caused to an appellant by the non-disclosure of evidence. The Grand Chamber agreed, holding that Article 5(4) required that suspects be given sufficient detail of the allegations against them in order for them to give effective instructions to their special advocate.

Secretary of State for the Home Department v AF and others (2009) 3 WLR 74

126. Following on from our successful interventions before the House of Lords in the 2007 control order appeals in *MB* and *JJ*,[207] JUSTICE was granted leave to intervene by way of written and oral submissions in the further control order appeals of *AF and others* in the Court of Appeal in October 2008 and the House of Lords in March 2009. In June 2009, a panel of nine Law Lords handed down an historic unanimous ruling that the right to a fair trial under Article 6 ECHR required defendants in control order cases to disclosure of sufficient detail of the allegations against them in order to give effective instructions to their special advocate – the same rule that was established in February in SIAC cases in *A and others v United Kingdom*. JUSTICE was represented pro bono in its intervention by Michael Fordham QC, Jemima Stratford, Shaheed Fatima, Tom Richards and Clifford Chance LLP.

[207] See para 118 above.

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In recent years, UK courts have begun to allow third party interventions – applications by public bodies, private individuals or companies, or NGOs to make submissions in cases that involve issues of public importance.

The establishment of a Supreme Court for the UK raises a number of questions about interventions, not the least of which is what is the proper role of interveners before the new Court? How should they be regulated? Are the current rules governing interventions too narrow or, as some have argued, too generous? And how far should the UK Supreme Court follow the much more expansive practice of supreme courts in other jurisdictions?

This report draws on JUSTICE's experience of intervening in cases before UK and European courts:

Part 1 looks at the third party interventions in UK courts, their development, and the procedural rules governing them.

Part 2 identifies key issues with the law and practice relating to third party interventions.

Part 3 provides a brief comparative survey of third party interventions before the supreme courts of other common law jurisdictions, and discusses the future role of third party interveners before the UK Supreme Court.

The report concludes with a series of recommendations – for the new UK Supreme Court, the Court of Appeal and the European Court of Human Rights – which aim to ensure interventions in the public interest are not unduly restricted.

The report's annex gives details of 20 of JUSTICE's most recent interventions in the UK courts

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