A matter of public interest

Reforming the law and practice on interventions in public interest cases

JUSTICE

PUBLIC LAW PROJECT

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The working party

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Introduction

This report concerns the litigation of cases which raise important issues of public interest. In particular, it looks at the extent to which courts are or could be assisted by individuals or groups with specialist knowledge or expertise in the matter being tried. This is of particular importance at a time when the courts are increasingly being asked to analyse and decide legal questions in the context of complex economic, social and political issues.

Both JUSTICE and the Public Law Project have, at different times, put forward proposals to allow groups greater access to the courts to litigate matters of public interest. Similar questions have arisen in the context of the debate on incorporating fundamental rights into domestic law. It is often assumed that individuals and groups will automatically have greater rights of access to the courts in the event, for example, of a Bill of Rights being introduced. However, the experience from other countries shows this is not necessarily so. Litigation in individual cases does not necessarily allow points of general public interest to be raised; it may also put well-resourced and large organisations at an advantage. For these reasons new rules (both substantive and procedural) governing questions of access and participation by those who may not be directly affected by a case are an essential accompaniment to any instrument guaranteeing fundamental rights.

It was with this in mind that JUSTICE and the Public Law Project set up a joint working party in October 1994 with the following terms of reference:

'To inquire into and consider any necessary reforms in relation to the law and practices governing the litigation of cases which raise a matter of public interest by persons other than individuals with particular reference to the position and role of public interest groups and to the role of amici curiae and third party interventions in such cases'.

In fact, the working party's discussions did include the position of individuals, as well as groups and organisations. As the terms of reference were self-imposed, it seemed appropriate to vary them to this extent.

The main focus of this report is therefore twofold. First, it considers

the question of individuals, groups and organisations being able to litigate in their own name in public interest cases – that is, cases which raise important matters affecting the public in general or a wide section of it. Recent examples of such cases include Greenpeace's action over site authorisation at Sellafield[1], the World Development Movement's challenge to the Government's decisions over funding of the the Pergau Dam in Malaysia[2] and Lord Rees-Mogg's case over ratification of the Maastricht Treaty[3]. For the purposes of this report and in order to distinguish them from other forms of intervention by groups or organisations, we refer to these cases as **'direct challenge cases'**. They are discussed in detail in chapter 1.

Second, it looks at the possibility of the same kinds of group being able to intervene and put forward a point of view in a public interest case that is already being litigated by others. For example, an organisation may have a particular interest in a case because of its own specific concerns or because it possesses a particular knowledge or expertise which would be of assistance to the court. We refer to this procedure as a **'public interest intervention'** and it is discussed in chapter 2.

One form of intervention which already occurs is by way of the appointment of an *amicus curiae* at the request of the court. The term has the literal meaning of 'friend of the court'. The practice is for the court to ask for the appointment of an *amicus* in those cases where an important point of law arises which for one reason or another may not be fully argued by the parties to the case. A barrister is then appointed by the Attorney General usually from a panel of names maintained by his office. This *amicus* has no interest whatsoever to represent save that of the court. As this is different from a 'public interest intervention' mentioned above, the report defines and distinguishes the role of this conventional form of intervention in chapter 3.

Existing law and practice

The working party considered the existing law and practice on these matters in some depth. In relation to the direct challenge cases by groups and organisations, it is plain that the public law courts are increasingly receptive to applications being brought by persons whose own private rights are not affected by the decision but who come to court in order

1 *R v Inspectorate of Pollution, ex p. Greenpeace Ltd (No 2)* [1994] 4 All ER 328

2 *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. The World Development Movement Limited* [1995] 1 WLR 386

3 *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] 1 All ER 457

to have an important issue litigated in the general public interest. This is well illustrated by the cases mentioned in chapter 1. The Law Commission's recent proposal that public interest challenges should be explicitly recognised as a category of case also reflects this change. It recommends the adoption of a two-track system for judicial review: the first to cover applicants who have been personally adversely affected by the decision, and the second to cover public interest challenges.[4]

In contrast, there is no clear doctrine as to the circumstances in which the court will allow or encourage public interest interventions. At present, neither the court rules nor established practice pay more than perfunctory attention to the possibility of intervention in proceedings by persons or groups who do not become a party to the proceedings. The only exception to this is the rules governing cases before the House of Lords which refer to an application for leave to intervene being made by petition and being referred to an Appeals Committee for decision[5]: the few cases where an intervention has been permitted do not provide, however, clear guidance on the criteria applied by the Appeals Committee[6].

The lack of interventions in cases before our own courts led the working party to look at the practices and experiences of other legal jurisdictions, principally America and Canada, and proceedings before the European Court of Human Rights.

Guiding principles

Several important matters of principle were discussed and decided upon at the outset. First, we decided that it is correct in principle to allow public interest challenges by groups or organisations, particularly where the issue being challenged may not reach the court for want of a directly affected individual applicant. In our view, this supports the true nature of the court's role in public law cases which is not to determine the rights of individual applicants but to ensure that public bodies do not exceed or abuse their powers.

Second, for the reasons we discuss in chapter 2, we consider there is a role for individuals and groups with specialist knowledge to make a useful contribution in public interest cases, particularly in relation to those that raise highly complex issues of social policy or morality. There are

4 *Administrative Law: Judicial Review and Statutory Appeals*, Law Commission No 226, paras. 5.20–5.22

5 *Practice Directions and Standing Orders: Applicable to Civil Appeals*, House of Lords (July 1994), Direction 20

6 See page 21 for discussion of cases in which the House of Lords has permitted an intervention by a third party.

many examples: requests by doctors and health authorities to withdraw feeding from a patient,[7] a challenge to the lawfulness of a government circular dealing with contraceptives for young people[8] and a challenge by journalists to the ban on broadcasting interviews with members of certain organisations in Northern Ireland.[9]

We believe that broader rights of intervention will ensure that the courts have access to information from a wide variety of sources and will therefore be better equipped to make these often very difficult decisions. In our view, it would not only enhance the legitimacy of the final decision but also increase public confidence in the judicial process itself. However, as we explain in chapter 2, the rules would need to ensure that the court maintains strict control over who may intervene and the nature of the intervention.

Public law

This report, by virtue of its focus on public interest cases, is largely concerned with matters of public law and the judicial review process whereby the courts exercise their supervisory jurisdiction over the activities of public authorities. We therefore make a clear distinction between public and private law when it comes to direct challenge cases.

In terms of interventions by third parties, we acknowledge that such a clear distinction cannot be drawn. There is clearly a significant sub-set of private law (as well as some criminal) cases which involve a strong element of public interest and where the arguments for permitting a public interest intervention can be just as valid. Recent examples include decisions in family proceedings on the sterilisation of a mentally disabled young person and the extent to which local education and social services departments are under a duty of care when carrying out their functions.[10] This report therefore deals with both public and private law proceedings when discussing third party interventions.

'Public interest'

This report uses the term 'public interest' with reference to either a type of case or a group or organisation. There is clearly no easy definition of what this means. In relation to cases, we have used it to refer to those

7 *Airedale National Health Service Trust v Bland* [1993] AC 789

8 *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112

9 *R v Secretary of State for the Home Department, ex p. Brind* [1991] AC 696

10 *X and Ors (minors) v Bedfordshire CC* [1995] 3 All ER 353

which raise a serious issue which affects or may affect the public generally or a section of it. When referring to organisations it is used to distinguish those whose aims are to further broad issues of public policy, such as the Child Poverty Action Group, from those whose role is, for example, to represent the interests of a membership.

The various kinds of groups and organisations which might wish to initiate or participate in a public interest case are discussed in more detail in chapter 1.

Advisory declarations

The Law Commission has recommended that the courts be permitted to make advisory declarations in judicial review proceedings where it is satisfied that the point concerned is one of 'general public importance'.[11]

Although this recommendation was discussed by the working party, we decided that no separate issues arose if the relief sought in the case was an advisory opinion rather than one or more of the existing remedies. In these circumstances, we took the view that the point fell outside our primary remit and therefore did not pursue it to a concluded opinion. However, we noted in passing that the concept of a 'point of general public importance' is much narrower than one which is of 'public interest'.

To that extent, we were concerned that the proposed formulation would unnecessarily curtail the court's jurisdiction to grant an advisory declaration in many public interest cases.

Director of Civil Proceedings

The working party had some discussion of Lord Woolf's suggestion for a Director of Civil Proceedings,[12] but decided for the purpose of this report only to take note of it.

The case for the establishment of such an official raises difficult questions. For example, it might be said that if the Director of Civil Proceedings was recognised as having an important function in deciding which cases should be brought as raising a public interest issue, the position of other bodies or persons as potential applicants with their own independent perception of the public interest would be undermined or sidelined. Such matters require separate consideration.

11 Supra at 4, para.8.14

12 See, in particular: *Protection of the public – A new challenge* pp.109–113 (Stevens 1990)

Conclusions

The working party reached the following conclusions for the reasons fully discussed in this report:

- **Public interest challenges should be explicitly recognised as a category of case and the High Court in judicial review proceedings should continue to have a broad discretion to allow individuals, groups and organisations to bring such cases. In making its decision, the first and most important question for the court is whether the issues raised by the prospective litigation ought in the public interest to be adjudicated upon.**
- **There are important advantages to be gained in the judicial process by allowing third party interventions in public interest cases where it is shown that the intervention is likely to assist the court. The court should retain strict control on who may intervene and in what manner.**
- **The present system of appointing a conventional *amicus curiae* to assist the court generally works well.**

CHAPTER ONE

Direct challenge cases

Recent cases show that the courts are increasingly receptive to applications for judicial review brought by persons or organisations with no directly affected interest, financial or otherwise, that is peculiarly their own; they come to court only to assert a public interest in having the issue determined.

Three recent cases exemplify this change of climate. First is the Greenpeace case, when the court allowed the organisation to challenge British Nuclear Fuel's decision to test its new thermal oxide reprocessing plant at Sellafield. In doing so, the court placed particular reliance on the fact that Greenpeace was a respectable and responsible environmental organisation, which could mount a more focused challenge than individuals.[13]

This kind of reasoning was taken a stage further in the Pergau Dam case.[14] The application for judicial review of the Government's decision to authorise expenditure of £234 million on a project in Malaysia was brought by the World Development Movement (WDM). This is an established pressure group which campaigns to improve the quantity and quality of British aid to developing countries.

Although the organisation could not directly claim to represent a client group, the court accepted that, in view of its reputation and track record, WDM had an interest in ensuring that aid money is spent lawfully. The court paid particular attention to the fact that if WDM could not bring the case, there was unlikely to be any other responsible challenger.

The third case involved a challenge by Lord Rees-Mogg to the ratification of the Maastricht Treaty.[15] Although this was different in that it was brought by an individual on no other basis than his 'sincere concern for constitutional issues', the decision to allow the case to proceed is

13 Supra at 1

14 Supra at 2

15 Supra at 3

testament to the courts' having adopted a more liberal approach to who brings cases raising important public interest questions.[16]

Nature of groups and organisations

It was decided to use the term 'public interest group' in a general sense throughout the report though there is clearly a need to consider what sort of groups might wish to initiate or intervene in public interest litigation. We identified at least four different situations which we categorised for our purposes as follows:

- **Statutory agency action:** This covers examples where the public interest is represented by a statutory agency or other public body, which may, like the Equal Opportunities Commission (EOC) or the Commission for Racial Equality (CRE), possess statutory power to support individuals in litigation. Both bodies have used this power widely to support test cases on behalf of their constituents and occasionally to litigate directly. The courts' acceptance of this kind of action was confirmed in a recent case brought by the EOC to challenge the Secretary of State for Employment's interpretation of a legal provision relating to redundancy payments.[17]

- **Group or class action:** This is where a group or class of persons comes together to litigate. A common example is that of an action group established following a disaster, such as *The Herald of Free Enterprise* ferry accident or the pleasure cruiser *The Marchioness* sunk in the Thames. These victim groups are becoming increasingly common in product liability cases.

- **Representative action:** This is where a group or organisation seeks to take action on behalf of its members, or to protect their interests. Common examples of this are trade unions or trade associations.[18] The *Fleet Street Casuals*[19] case involved just such a group: the National Federation of

16 The decision in *R v The Secretary of State for the Environment, ex p. Rose Theatre Trust* [1990] 2 WLR 186 which refused an application from a group of people to save the site of the Elizabethan Rose Theatre can now be viewed as being an exception to this trend. The most recent case of *R v Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [5 February 1996], in which leave was given to an immigration organisation to challenge new regulations relating to asylum seekers, endorses this view.

17 *R v Secretary of State for Employment, ex p. Equal Opportunities Commission and Day* [1994] 2 WLR 409

18 We endorse the Law Commission's recommendation that unincorporated associations should be permitted to make judicial review applications through one or more of their members applying in a representative capacity. See supra at 4, para.5.41.

19 *R v IRC, ex p. National Federation of Self-Employed and Small Businesses* [1982] AC 617

Self-Employed and Small Businesses. It wished to challenge the Inland Revenue's grant of a tax amnesty to casual workers in the printing industry. Although the House of Lords ruled that one taxpayer would not normally have standing to seek review of another taxpayer's assessment, it left open the possibility that a challenge might be allowed in a case of sufficient gravity. Another example was the case brought by the Royal College of Nursing to challenge the legality of a circular advising that it was lawful for nurses to do certain acts in connection with abortion.[20]

- **Public interest action:** This is a different kind of representative action in which a group acts on behalf of people who are not before the court and perhaps cannot even be identified. The cases brought by Greenpeace and the World Development Movement mentioned above are examples of this kind of case. In either case, it is hard to see anyone as 'directly affected' or 'aggrieved' in the technical sense of these terms; it was the public at large that was being represented. Similarly, there are examples of cases brought to represent a section of society. For example, the Child Poverty Action Group (CPAG), an organisation committed, among other things, to ensuring fairness and legality in the welfare benefit system, litigated to draw attention to mounting delays in the administration of benefits.[21] No doubt there were some people affected by the delays whose interests the organisation might claim to represent, but they were not obviously identifiable. In reality, it was seeking to raise a matter of general concern. This, in our view, is the 'public interest action' properly so called.

Standing to sue

The technical term used to determine whether someone is able to make an application for judicial review is *locus standi* or standing to sue – that is, whether the applicant can show 'sufficient interest' in the issue to be litigated.[22] This question of standing is often a preliminary question determined when leave is sought to start the action.

The seeds of the courts' present approach on standing, at least as a matter of recent legal history, were sown in the Fleet Street Casuals case.[23] There, the *dicta* in the House of Lords relating to standing in judicial review undoubtedly displayed a generous approach. This pointed the way to a jurisprudence in which the real question, in a public law

20 *Royal College of Nursing of the UK v Department of Health and Social Security* [1982] AC 800

21 *R v Secretary of State for Social Security, ex p. CPAG and Others* [1990] 2 QB 540

22 RSC Order 53 Rule 3(7)

23 Supra at 19

case where the applicant was not specifically affected, was whether the *issue* placed before the court ought in the public interest to be the subject of an adjudication.

More recently, the Law Commission has proposed that a new form of public interest standing be available to groups. This would allow the court a broad discretion to grant standing to a group, including an unincorporated association, that wishes to bring a public interest action. The Law Commission proposes that this reform be implemented by an amendment to the Supreme Court Act 1981 and to the rules in RSC Order 53 to allow a judicial review application to be made when the court 'considers that it is in the public interest for the applicant' to bring the case.[24]

We are broadly in favour of this approach. In arriving at this decision, we took as our starting point the principle that challenges brought by individuals, groups or organisations to the decisions and actions of public bodies based on public interest grounds should be entertained by the court. The legal philosophy which underpins this position is not merely unease that a public body might be getting away with unlawful action in the absence of a directly affected challenger. It also springs from the belief that the true nature of the court's role in the public law jurisdiction is to control the use of public power in the public interest.

In most cases this will combine with the more familiar judicial function of protection of the rights of an individual or individuals: for example, the immigrant, obviously directly affected by the immigration officer's decision, asserts that public power has been abused in his or her case. Other examples are that of the homeless applicant, or the child made the subject of a statement of special educational needs. However, the jurisdiction is not defined by reference to the interests of individual applicants. As we have seen, there are cases in which a public interest exists to ensure that public power is exercised lawfully, although there is no directly affected applicant who is willing and able to challenge.

Floodgates

During the course of our deliberations, we considered whether an express acceptance in principle, by statute or rule, of a right to make public interest challenges might not create the risk that the courts would be overburdened, even flooded, with applications brought by well-resourced groups or institutions. In order to assist these discussions, we considered, in general terms, the experience of other jurisdictions.

In the USA, for example, the exponential growth of litigation has

24 Supra at 4, para. 5.22

included a well-documented increase in group litigation, often brought by specialist lawyers or public interest law firms. Nearer home, a high proportion of the cases against the British Government before the European Court of Human Rights are sponsored by groups[25], while representative actions are beginning to appear regularly on the docket of the European Court of Justice.[26] In Canada, the expanded jurisdiction of the Supreme Court after the introduction of the Charter of Rights has heightened consciousness of litigating over public interest matters. Groups and organisations have taken advantage of this and it has led to the Canadian courts opening up their procedures to be more receptive to such litigation.

As one of our number observed in a working paper: 'group desire to litigate is a world-wide phenomenon and it seems unlikely that it will be avoided here'. In the end, however, for several reasons, we do not consider that fears of this kind, which may not prove to be well-founded, should be a decisive factor. First, it is to be noted that although the similar exponential growth of judicial review cases in the last 15 years in this country has been remarkable[27], the extent to which it has recently been attributable to pure public interest challenges is very slight. Those cases are always, and rightly, well-publicised.

Second, the truth is that the Law Commission's proposals in this field represent no more than an explicit recognition of the present state of the law. Its proposed amendment to allow judicial review applications on public interest grounds is what the High Court already does. We see no reason why its recognition in statute law should create a sea-change in the range of cases which the court is prepared to entertain.

Moreover, there are already many grounds in administrative law on which a court may decline to entertain litigation. For example, the good faith of the public interest applicant may be in question; the case may have been brought outside the statutory time-limit of three months or otherwise unacceptably late; there may be an individual directly affected by the decision who nevertheless has not sought to come to court; or, there may not be an arguable case or the point raised in the case might be purely academic or hypothetical. The court also possesses an inherent right to strike out dubious or vexatious cases brought by 'busybodies'.

In our view, the key to proper control of litigation of this kind rests in a recognition that in a public interest challenge the court, in deciding whether the application should go ahead, is not primarily concerned with the question of standing at all. This is in contrast to the applicant who

25 Harlow and Rawlings, *Pressure Through Law* 1992, (London: Routledge)

26 C 170/89 *Bureau Europeen des Unions des Consummateurs (BEUC) v Commission* [1991] ECR 5709 is an important precedent here.

27 525 leave applications in 1980; 3208 in 1993: *Judicial Statistics.*

asserts his or her own interest and therefore must show standing: the immigrant or the homeless person, for example. But in a public interest case the court's first concern is to see whether the issue raised is one which ought to be litigated irrespective of the applicant's identity. If it should, the court will then look at the range of other factors, from delay to bad faith, in deciding whether as a matter of discretion the case should go ahead. From first to last the question will be whether the court judges that in all the circumstances the case should in the public interest proceed.

For these reasons there is an important difference of principle between the personal case and the public interest case brought in judicial review proceedings. Unfortunately, this distinction appears to be obscured in the Law Commission report, because the issue of public interest challenges is dealt with as a matter of standing, when in truth it is nothing of the kind. In fairness the courts in dealing with such cases have tended to use the same language. Though it requires no rule change different from that proposed by the Law Commission, we would express the hope that the jurisprudence in this area may in the future reflect the logic of public interest cases, which dictates that the standing of the applicant is at most a secondary consideration.

The question of guidelines

The decision as to whether a case should proceed in the public interest will remain in the court's discretion. The question therefore arises whether the court should be obliged to apply a prescribed set of criteria or have regard to guidelines when making this decision.

The Law Commission also considered this point. Its report refers to a series of factors which might be taken into account including the importance of the legal point and the chances of the issue being raised in any other proceedings.[28] However, it concluded that 'a simple test allowing the application judge a broad discretion is preferable'.

While we broadly agree with this approach on the grounds that statutory criteria are unnecessary, we nonetheless think that there is a strong case for a Practice Statement setting out a description of those principles which should be considered when the court is deciding upon a public interest challenge. Not only would this assist the court in maintaining a consistent approach to decision-making but, just as importantly, it would provide an indication to prospective litigants as to the requirements that must be satisfied in order to be allowed to mount a public interest challenge.

In addition to the Law Commission, some of the recent cases,

28 Supra at 4, para 5.22

particularly the Greenpeace and Pergau Dam judgments, have attempted to formulate a set of tests to be applied when considering whether a group or organisation has the appropriate credentials to represent the particular public interest issue raised by the case. After considering these in some detail, we consider that a Practice Statement might refer to the following considerations:

- the case raises an important point as to the use of public power by a public body
- the applicant has special expertise or knowledge in the issue in question
- the applicant represents a section of the public which is generally affected by the decision sought to be challenged
- the applicant has a statutory role in relation to the subject matter of the proposed challenge
- the case may not be pursued or concluded by a directly affected individual applicant.

Applicants would not, of course, be expected to fulfil all these criteria; they are a list of alternatives that may be applied. We appreciate that in some cases, including the Greenpeace case, the applicant's ability to meet the respondent's costs has been regarded as a material, though not determinative, consideration. There is a danger that its formal inclusion as a material factor could be viewed (and applied) as something approaching the imposition of a means test as a condition for litigating. No such rule exists in other cases, and any requirement of this kind might be said to tread on the territory of the law relating to security for costs.

We believe that the availability or otherwise of a directly affected challenger should generally be a subsidiary consideration. As we have sought to emphasise, the first and most important question for the court will be whether the issues raised by the prospective litigation ought in the public interest to be the subject of adjudication.

Costs

The question of costs is crucial to the debate on greater access to the courts in public interest cases. Without financial provision or guarantees of financial support, only those groups that are well-resourced will be able to take the risk of losing such a case. This was an issue on which there were several different points of view amongst members of the working party. On the one hand, there is a general consensus in support of the Law Commission's recommendation that in public interest cases where the litigation is allowed by the grant of leave to proceed to a substantive hearing, the court should be accorded a discretion to award costs out of

central funds.[29] On the other hand, some members of the working party consider that this would not go far enough in remedying the problem of *uncertainty* over costs which may discourage an applicant from ever embarking on a case. They believe that any new rule needs to cover this point as well.

This uncertainty of costs issue was considered by the Ontario Law Reform Commission in a report in 1989. It proposed that the applicant could ask for a decision on costs at any point in a public interest case and the court would be prevented from ordering costs against the applicant if the following conditions were met:

- the case involves issues whose importance extends beyond the immediate interests of the parties involved;
- the applicant has no personal, proprietary or pecuniary interest in the outcome of the case
- the respondent has a clearly superior capacity to bear the costs of the proceedings.

This would not apply where the court considers that the case falls into the category of being vexatious, frivolous or abusive.

Some members of the working party felt that this might well be a useful approach to the problem caused to applicants by the uncertainty of costs.

Conclusion

On the question of allowing direct challenges by individuals, groups and organisations who wish to assert a public interest in having an issue determined, the working party puts forward the following recommendations:

- **Public interest challenges should be explicitly recognised as a category of case and the High Court in judicial review proceedings should continue to have a broad discretion to allow individuals, groups or organisations to bring such cases.**
- **There should be a Practice Statement which sets out those matters which the court should consider when deciding the question of leave for the case to be litigated. The court's first concern is to see whether the issue raised is one which ought to be litigated; the standing of the applicant is, at most, a secondary consideration.**
- **The Law Commission's proposal for the court to have a discretion to award costs out of central funds in public interest cases should be introduced.**

29 Supra at 4, para 10.6

CHAPTER TWO

Public interest interveners

Intervention by a person or group who is not a party to a case is a procedure well developed in other jurisdictions. In the United States, this is reflected by the increasing use of written briefs submitted by *amici curiae* who are typically groups and organisations who wish to bring the courts' attention to a point of view or matters beyond those addressed by the parties to the case.[30] The proportion of Supreme Court cases in which such interventions are filed has grown steadily over the century, from less than 2% in the first half to over 50% in the 1970s. This reflects the courts' willingness in the important and controversial civil rights cases of the 1960s and 70s to acknowledge that the cases would affect people far beyond those immediately involved.

In Canada, the increasing willingness of the courts to broaden the possibilities of public interest intervention has been particularly marked in cases under the Charter of Rights and Freedoms. The courts have recognised that it is in just such cases that the judgment is likely to have an impact on a much wider circle of people than the immediate parties to the proceedings. The importance of ensuring that those affected are able to participate in the judicial process is equally important.[31]

The arguments for and against permitting interventions, particularly in cases affecting fundamental rights, are numerous. The arguments in support are based on the premise that the court will benefit from receiving a diversity of information, views and opinions. In other words, interventions promote a better informed court which, in turn, enhances the legitimacy of the court's decision. At the same time they allow the protection of interests that might otherwise be unrepresented in the

30 For a discussion on the different forms of *amicus* briefs, see page 24.

31 Lord Justice Henry in the recent case of *R v The Admiralty, ex p. Lustig Prean and Others* 3 November 1995 said: '. . . if the Convention [European Convention on Human Rights] were to be made (or possibly held to be) part of our domestic law, then in the exercise of the primary jurisdiction, the court in, for it, a relatively novel constitutional position, might well ask for more material then the adversarial system normally provides, such as a 'Brandeis brief'. The Court could well appear to be taking too narrow a view if it hypothetically answered a difficult question on limited evidence'.

litigation and lessen the risk of a multiplicity of actions over the same matter.

The arguments against largely point to the disadvantages of increased public involvement in the court's decision-making process. With a large and increasing workload, it is said that the courts would not be able to accommodate a further process which may well complicate and lengthen cases. It is also opposed on the ground that third party interventions are a form of lobbying which is, of course, anathema to the independence of the courts.

The working party considered these arguments in some depth and, for the reasons below, came to the conclusion that the advantages to be gained in the judicial process generally outweigh the disadvantages. In particular, we took the view that the practical disadvantages can largely be overcome by the court having the power to maintain strict control over the proceedings and thereby prevent irrelevant, over-long or repetitive submissions by third parties.

Present law and practice

At present neither the rules nor established practice in the courts pay more than perfunctory attention to the possibility of intervention in either public or private proceedings of persons or organisations who are non-parties. For example, in the area of public law and judicial review proceedings in the High Court it is only the provisions of RSC Order 53 which can have any relevance and then only indirectly:

- Order 53 Rule 5(3) provides for service of the court papers on 'all persons directly affected'. In practice, this is merely the rule under which the respondent is to be served.
- Order 53 Rule 5(7) permits the court to adjourn proceedings and order service of the papers on any person where it is 'of the opinion' that that person should have been served.
- Order 53 Rule 9(1) allows any person who 'desires to be heard in opposition' to the application to do so, so long as the court considers them to be a proper person to be heard.[32]

It should however be noted that in the recent case of *R v Minister of Agriculture, Fisheries and Food, ex p. Anastasiou (Pissouri)*,[33] Mr Justice Popplewell held that, in addition to the rules, the court in judicial review proceedings has an inherent jurisdiction to permit persons to be

32 Although RSC Order 15 Rule 12 governing representative actions could be viewed as a form of intervention, it is not relevant to the matters being discussed.

33 1994 COD 329

heard in order to ensure that all those affected by a decision in the case have an opportunity to present their case.

In private law proceedings in the High Court at first instance, the rules of court do not cater for third party interventions, although at the Court of Appeal stage the court can order that the relevant papers be served 'on any person not party to those proceedings' under Order 59 Rule 8 (1).[34]

However, the rules governing cases which go to the House of Lords are more specific: proposed interveners may petition the Appeals Committee for leave to intervene[35]. However, this rule gives no guidance as to the criteria on which such applications are to be decided.

There are, it seems to us, questions of great importance relating to the issue of the circumstances, and the procedures, whereby parties who are initially strangers to litigation set on foot by others, can be heard by the court. These questions primarily arise in the public law context where the court is considering compliance by public decision-makers with the legal standards of conduct. This is quite different from the court's super-intendence of private rights where its concern is limited to the business of adjudicating as to the rights of the parties before it. The court's approach to the tensions between ruler and ruled, between the decision-maker and the party affected, and (to put it broadly) to the whole concept of the legal reach of governmental power is inherently likely to be a richer field for the introduction of arguments by third parties than is the standard private law case of contract, tort or other causes of action.[36] Even so, private law will figure in what follows; but we first deal with the position in public law cases.

Public law: categories of intervention

In our view it is important to articulate the different categories of case in which interventions by third parties might be contemplated. We have

34 In *Ridehalgh v Horsefield and Another* [The Times 28 January 1994] the Court of Appeal allowed applications under this rule by the Law Society and the General Council of the Bar to address arguments in respect of 'wasted costs' orders against legal advisors. The Court ordered that any additional costs reasonably incurred as a result of the participation of the professional bodies be paid by them jointly. In the recent case of *Tolstoy-Miloslavsky v Aldington* which also concerns a wasted costs order, the registrar of civil appeals directed that the notice of appeal be served on these professional bodies: 5 December 1995.

35 Supra at 5

36 The boundary-lines between public and private law have caused a good deal of difficulty, both as regards the question whether the issue raised is in truth a public law issue, and whether the decision-maker is a public body for the purposes of the judicial review jurisdiction. This report is not the place for a treatise on the subject, but see Lord Woolf's article *Droit Public – English Style* [1995] PL 57, where the problems are discussed.

identified three broad classes which, as will be seen, are not mutually exclusive:

- cases where the third party's own concerns ought in justice to be canvassed i.e. the person has a claim to be heard in his or her *own* interest rather than in the public interest.
- cases where the intervention by a third party is desirable for the assistance of the court on grounds of public interest. We refer to this group as 'public interest interveners'.
- cases where the intervention by a third party is desirable for the assistance of the court on questions of law or fact i.e. the conventional *amicus curiae* who intervenes at the specific request of the court. As this has a very different prescribed role to that of the other forms of intervention, we deal with it separately in chapter 3.

In drawing up these categories there are several points to be made. First, it is important that these types of intervention are distinguished from those cases where the court takes the view that the applicant has omitted to serve the originating application on a 'directly affected' person or body. In these circumstances, it can order that this happen under RSC Order 53 Rule 5(3). Similarly, if on the hearing of the application the court considers that there is a person or body which ought to have been served with the court papers, it may adjourn the case under RSC Order 53 Rule 5(7) for such service or, at least, for enquiries to be made as to whether the party in question wishes to be heard. In neither case is this strictly an intervention by a third party since by definition the person or body should have been treated as a respondent in the first place.[37]

Second, there will be instances where there is an overlap between the categories. For example, a government department may be affected by an application to which it has not been made a party: the *vires* of a Statutory Instrument made by the Department may be in issue, or some aspect of government policy may be subject to scrutiny in the case. In these circumstances, the department may apply to be heard under RSC Order 53 Rule 9(1) (see above); but that assumes that it has notice of the litigation, and it may not.

The reason why these cases should be specifically noted is that they illustrate the elusive quality of an important distinction: it is between instances where justice requires that the third party be heard in his or her *own* interests, and those where the court will wish to hear the third party in the *public* interest. Where the intervener is not a

37 Such persons or bodies who become involved in proceedings in this way are not generally liable for costs unless they play a part in the case.

public body and has only a personal axe to grind, he or she is plainly on the former side of this dividing line. Where a public body is involved, and especially where the rules made by the body affecting the public are in play, there are two considerations. First, fairness will ordinarily dictate that the public body should be heard, since decisions for which it is responsible are being scrutinised by the court, which may make criticisms of its procedures. In this regard, the public body is in no different a position from that of a private party whose conduct is being examined by the court and who in justice should have the opportunity to answer.

Second, however, the court in general ought to have the assistance of the decision-maker in order to ensure in the public interest that it has all the necessary material to decide upon the validity of the rule or decision in question: not only out of fairness to the decision-maker but to protect the concerns of those affected – many of whom may not be before the court.

'Own interest' intervention

It is in the nature of judicial review cases that the decision challenged may have direct consequences for persons or bodies other than the applicant or respondent. As stated above, the principle of fairness may require that directly affected persons or organisations be permitted to intervene and be heard in their own interest.

The third party may wish to adduce grounds for supporting the application in addition to the arguments to be put forward by the applicant or may wish to say something which for one reason or another is not open to the original applicant, or which the latter might find tactically inconvenient to put forward. We believe that it is perfectly reasonable to allow an intervention in such circumstances rather than requiring the third party to launch separate proceedings: indeed, it may be in the court's legitimate interest for this to happen, having regard to the need to determine public law business expeditiously and to avoid the extra cost and time involved in multiplicity of proceedings. The court, of course, will be alert to prevent duplication of argument: that is not a difficult judicial exercise (it happens frequently in the Court of Appeal (Criminal Division) where different counsel are instructed for co-appellants who have overlapping cases).

On the other hand, the intervention may be sought in order to oppose the application. An example of this is the government department whose policy may be subject to scrutiny but which has not been made a party to the case, as mentioned above. The same situation may exist where any other statutory regulator – notably a local authority – finds its

rules or bye-laws impugned in a case to which it has not been made a party.[38]

This type of case, in which the intervention is at the third party's application to be heard in their own interest, is at present reflected in the court rules only by the terms of RSC Order 53 Rule 9(1):

'On the hearing of any application for judicial review any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard'.

It should first be noted that this rule only caters for an application being made by a person or body who seeks to intervene and be heard *in opposition* to a judicial review application; it does not contemplate an application to intervene *in support*. Second, this procedure for third party interventions has been traditionally relevant to those wishing to intervene in their own interests, rather than in the public interest. However, recent decisions indicate that the courts may be broadening the interpretation of who may be 'a proper person' to include a public interest intervention.

This was illustrated by the interventions permitted in the recent litigation over the export of veal calves. In three separate applications for judicial review the question arose whether public authorities operating air and sea ports were entitled to ban the flights or shipment of livestock by animal exporters; and, if so, whether they could properly refuse to do so in order to avoid the disruptive consequences of unlawful protest by animal rights protesters. In one application, the animal welfare organisation, Compassion in World Farming, was permitted to intervene under Rule 9(1) on what can be described as public interest grounds; in another, Portsmouth City Council intervened under the same rule but on own interest grounds.[39]

Whilst we welcome this approach we nevertheless believe that public interest interventions should be recognised as a separate category governed by new rules for the reasons that we discuss below. This would then mean that the Rule 9(1) procedure would principally remain applicable to interventions made on own interest grounds – although, inevitably there will be some cases which fall within both categories. In any event, we strongly recommend that this rule should be amended to

38 This is unlikely to happen very often. In fact, the type of case where a rule-maker (governmental or otherwise) is most likely to find its rules impugned in litigation to which it is not a party arises where there is a collateral challenge to the rules in criminal or private law litigation.

39 *R v Coventry City Council, ex p. Phoenix Aviation and Others* [1995] 3 All ER 37. The National Farming Union (NFU) intervened in one of the applications under Order 53 Rule 5(3).

allow interventions *in support* of a judicial review application; there appears to be no justified reason for the present anomaly (see appendix).

Public interest interventions

Our second category of interventions deals with this less-developed practice of permitting third parties to intervene on public interest grounds. We would wish to emphasise that the value of recognising such a category of intervention does not rest on any need to give effect to the interests of the intervener as such. Its legitimacy depends primarily on the court's perception that the public interest requires the intervener to be heard. It follows that in this class of case there should be no question of the power to permit intervention being exercised on the basis that the intervener has a claim to a right to be heard in his or her own interests; such a case falls entirely within the first category. Interveners in this second category should be designated in any rule which might refer to them as 'public interest interveners'.

There are a number of instances in which the courts have either requested or permitted the presence of a public interest intervener. In *Shields v E.Coomes (Holdings) Ltd*[40] the Court of Appeal invited the Equal Opportunities Commission to participate so as to assist the court in relation to European discrimination law. In *Science Research Council v Nasse* and *Leyland Cars v Vyas*[41] the House of Lords permitted a joint intervention by the Equal Opportunities Commission and the Commission for Racial Equality upon the question of whether the plaintiffs in discrimination cases might obtain discovery of confidential reports on other employees or job applicants. In *Sivakumaran*[42] counsel for the United Nations High Commissioner for Refugees was allowed to address the House of Lords in a case concerning the interpretation of the 1951 Geneva Convention Relating to the Status of Refugees.

There is however one well known case where an application to intervene was rejected: in *Gillick*,[43] (relating to the legality of Government guidance to doctors concerning the provision of contraceptive advice and treatment to children under 16 without parental consent) the Children's Legal Centre applied to lodge a case and participate in the appeal to the House of Lords, but after objection from Mrs Gillick's counsel, the Law Lords refused the application. It is questionable whether this case would have been similarly decided today. A recent decision of the Appeal

40 [1978] 1 WLR 1408

41 [1979] 3 WLR 762

42 [1988] AC 958

43 Supra at 8

Committee probably more accurately reflects the view to be taken by the present-day Law Lords: it has permitted a written submission by the civil liberties organisation, Liberty, to be made available to the parties to the appeal. The case is a criminal appeal relating to the use of a surveillance device by the police in a drugs investigation.[44]

We anticipate that the kind of groups that would wish to intervene in this way are the same or similar to those described at page 8 in relation to direct challenge cases. Some will have a statutory foundation, such as English Heritage and the Equal Opportunities Commission; others, such as the World Development Movement or Greenpeace, will not.

The essence of our reasoning in supporting public interest interventions is simply that cases arise in which the court should be able to call upon bodies with special expertise in whatever area of law is being considered. The situations in which such intervention might be of use to the court, and the identification of potential public interest interveners, cannot be rigorously defined or classified. This is because the subject matter of judicial review is only limited by the consideration that the act or decision impugned should have been taken by a public body subject to the public law jurisdiction and therefore the classes of case which the jurisdiction covers are very wide, and, in the present state of law, unpredictable.

We have referred above to 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 (other than a conventional *amicus curiae*) 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 of the provisions of RSC Order 53.[45] 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.

Need for controls

Experience from countries which permit third party intervention shows that there can be a variety of motives behind applications to intervene.

44 *R v Khan (Sultan)* [1994] 4 AER 426. Appeal Committee's decision on petition to intervene taken on 30 December 1995.

45 See above at page 16 for further discussion of RSC Order 53.

For some interveners the interest is solely to assist the court dispassionately; for others, it may be a desire to promote so far as they can a particular result. Whatever the motive, we nevertheless believe that they need to be carefully controlled.

By definition, there will already exist properly constituted proceedings in any given case in which the applicant and respondent will need to be protected against an inflated liability for costs which may arise if the proceedings are lengthened by the intervention. In addition, a well-resourced intervener may enter the case so emphatically on one side that this may, at least, produce an appearance of unfairness to the party on the other side. This could be especially so where the intervener has access to factual material which may be beyond the reach of the party who is opposed.

Related to this there is also, potentially at least, a more subtle difficulty. Once the court admits an intervener with a specialist factual brief, perhaps including research materials which may be of a contentious nature, it could be said that it is starting to move a significant distance from its conventional role as adjudicator of a dispute conducted on adversarial grounds. The point is not that the process becomes inquisitorial: inquisitorial procedures, in a system firmly rooted in the combative traditions of the common law, may nevertheless in some situations have great advantages. It is rather that a development of this kind may encourage the court to adopt something akin to a legislative function.

For example, the cases where a public interest intervener is likely to take part will almost inevitably concern issues of policy: perhaps government policy, or the policy of the law itself set out in past jurisprudence. On its face the question will be whether the government's policy satisfies the traditional public law tests or, where the policy is of the courts' making, whether it ought to be changed. The admission of refined factual arguments put forward by an intervener may tempt the court to take a more interventionist position in relation to the former, and a more radical or contentious position in relation to the latter, than it has traditionally occupied.

Many would argue that there is a case for the judiciary to move further towards the role of a constitutional court in relation to issues of fundamental rights and freedoms.[46] Even this much is contentious and, in any event, it is a basic axiom of the constitution that the unelected courts must not trespass on the fields of decision that are the responsibility of the democratic arm of government. That, of course, begs the question

46 This is to some extent addressed in two recent articles by the chairman of the working party: 'Is the High Court the Guardian of Fundamental Constitutional Rights?' *Public Law* 1993 p 59 and 'Law and Democracy', *Public Law* 1995 p.72.

of where the dividing line should be drawn, a matter which calls for detailed analysis far beyond the remit of this report.

We raise the issue, however, to provide a warning against an excessive enthusiasm for public interest interventions. It is necessary to seek a balanced view of the advantages, disadvantages and potential problem areas of intervention procedures. In order to do this the working party considered the experience of the United States in some detail.

The United States experience

In the United States the typical public interest intervention is by way of *amici curiae* submitting written briefs. The use of the term *amicus* in this context has more in common with a public interest intervener than with the traditional function of an *amicus* in our own jurisdiction. The written submissions are officially referred to as *amicus* briefs but they may take either of two forms: the more traditional *amicus* brief which focuses on factual background material and legal contentions or the 'Brandeis brief' which frequently includes sociological and economic material to inform the court of the broader public interests and implications involved in the issue being litigated. No distinction is made in the court rules between these types of briefs: they both fall within the term of *amicus curiae* briefs. The Supreme Court rules impose restrictions on the circumstances in which such briefs will be received. In particular the court may refuse to entertain a brief if one of the parties to the litigation objects (unless it is presented by the United States Government). However, the proportion of cases in which *amicus* briefs have been filed has grown steadily and, in practice, it seems that the court nowadays grants virtually unimpeded access to interested third parties to present such a brief. For example, over 60 briefs were filed in the abortion case of *Webster v Reproductive Health Services*.[47]

The identity of groups or persons submitting *amicus* briefs to the Supreme Court is very diverse. Apart from the Federal and State Governments, they have included trade unions, corporations, charity and pressure groups including public interest law firms, and individuals such as judges, private attorneys, and physicians. Not all present a Brandeis brief, with its characteristic panoply of data. Increasingly *amici* have become more partisan; and it seems this development is much more marked in the Supreme Court than in the lower courts. Indeed in *US v Gotti* the New York District Court, refusing permission to the New York Civil Liberties Union to file an *amicus* brief, said:

47 [1989] 57 LW 5023

'Rather than seeking to come as a friend of the court and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the NYCLU has come as an advocate of one side, having only the facts of one side at the time. In doing so, it does the court, itself, and fundamental notions of fairness a disservice.'[48]

Whatever the balance between the traditional neutral role and the frankly partisan approach, the filing of *amicus* briefs especially at the Supreme Court stage has clearly become something of a legal industry. The impact on the court's decisions is harder to gauge, but since on the whole the court seems very receptive to *amicus* briefs it has presumably found them of material assistance. In the landmark abortion case of *Roe v Wade*[49] the majority opinion relied heavily on historical, social, and medical data presented to the court by *amicus* groups. Such an outcome sits readily with the Supreme Court's unique law-making functions; and other features of the situation in the US, particularly the preponderance of State Governments as *amici*, reflect the federal constitutional system in which there may be inter-state conflict and the Supreme Court has the task of ruling on the validity both of State and Federal legislation.

In our own jurisdiction, whatever the impetus towards yet more active judicial review and the emergence of an express recognition by the common law of the concept of fundamental rights and freedoms, the dividing line between the legislative and judicial functions is and will no doubt remain much more clearly marked. The scope for the Brandeis brief is correspondingly reduced, since by its nature the assistance it offers is of particular utility where the court has to rule on the merits of a large question of social policy: common currency in the Supreme Court, but a rarer species in our courts.

Furthermore, where the intervener is fully armed and resourced, and seeks to come to court with a determined purpose to pursue the interests of those whom he or she represents, there is a danger that the process has all the appearance of a lobbying exercise. Lobbying in one form or another is appropriate enough when it is directed at a government or public body (though even here there are of course contentious issues). No court should welcome lobbying, because its duty is not to respond to pressure but to decide according to principle.

It follows that a balance has to be drawn. We are clear that there should be no circumstances in which a putative public interest intervener is accorded anything approaching a right to intervene. From first to last, the question of whether intervention is to be allowed should be in the hands of the court; and the court must have the power to allow, decline or invite intervention.

48 [1991] 60 LW 3197

49 [1973] 410 US 113

Canadian experience

The Canadian experience is interesting and instructive. The Ontario Rules of Civil Procedure distinguish between leave to intervene as an added party (closely similar to our first category of third party intervention) and leave to intervene as 'friend of the court'. In the latter case the intervention is 'for the purpose of rendering assistance to the court by way of argument'. The Supreme Court of Canada Rules make no such express distinction, providing merely that 'Any person interested in an appeal or a reference may, by leave of a Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Judge may determine.'

In terms of the detailed procedures, under the Ontario Rules the intervener has to satisfy the court not only that he or she has an interest in the proceedings but that the submission will make a useful contribution to the case. A recent judgment of the Ontario High Court held that:

'Where intervener status is granted to a public interest group, either as a party or as a friend of the court, it must meet at least one of the following criteria: have a real, substantial and identifiable interest in the subject-matter of the proceedings; have an important perspective distinct from the immediate parties; or be a well-recognised group with a special expertise and a broad identifiable membership base.'[50]

As part of the decision on whether or not to allow the intervention, the court is bound to consider whether the intervention will cause injustice or undue prejudice to the original parties to the action.

If given leave to intervene, the intervener has the right to file a 'factum' – written submission of fact – but, unless the Judge otherwise orders, this may not exceed 20 pages. Special leave from the court is required to allow the intervener to address the court orally.

The European Court of Human Rights

Nearer to home is the practice of the European Court of Human Rights. Under its rules of procedure, third parties may be invited or granted leave to submit written comments on a case within a time limit and on specified issues.[51] The Court can allow anyone making written submissions to appear in person before it.[52] Applicants to intervene must show that they have a discernable interest in the issues raised by the case and the intervention is

50 Headnote to law report in the case of *Attorney General for Ontario v Dieleman et al* [1993] 16 OR (3d) 32.

51 Rule 37(2)

52 Rule 40(1)

likely to assist the Court in carrying out its duties. It is said that the Court's policy of allowing interventions is based on the premise that non-government organisations and other outside bodies have an interest in contributing to the legal debate on the interpretation of the Convention[53].

The cases show that the Court's receptiveness to intervention by third parties has evolved considerably over the years. In 1981 the Court allowed the TUC to intervene and be heard in a case concerning the trades unions' 'closed shop' rule.[54] Its intervention was to allow representations of fact for information. Some other examples of third party interventions before the Court in cases brought against the UK include the Post Office Engineers Union's intervention in the telephone tapping case of *Malone v UK*,[55] the mental health organisation, MIND's, intervention in a case to provide information on conditions in mental hospitals and patients' rights[56] and Article 19's intervention in the Spycatcher case to submit a detailed brief on comparative law on press censorship.[57] More recently, a number of human rights organisations[58] have been allowed to make written submissions in the case of *Murray v UK*[59] which concerns the changes introduced in Northern Ireland to a defendant's right to remain silent during police questioning and at trial.

This receptiveness of the Court appears not to have opened the floodgates to excessive requests. Since formalisation of the rules covering third party interventions in January 1983, 42 applications to intervene were filed to intervene in 33 cases during the period up to the end of 1994, mostly by non-government organisations; 17 applications were refused for various reasons.[60] Although the working party has not undertaken detailed research on this, it is clear that in a number of cases the information and arguments put forward in the intervention have played an important role in affecting the Court's judgment. For example, in *Malone*, the applicant complained (inter alia) that his telephone had been 'metered' by the Post Office on behalf of the police and that details

53 'Amici curiae: third party interventions before the European Court of Human Rights', Anthony Lester in *Protecting Human Rights: the European Dimension*, Carl Heymanns Verlag KG 1988.

54 *Young, James and Webster v UK* [13.8.81] Series A. No44

55 [1984] 7 EHRR 14

56 *Ashingdane v UK* [1985] 7 EHRR 528

57 *The Observer and Guardian v UK* 26.11.91 A.216; *The Sunday Times v UK* 26.11.91 A.217

58 Including JUSTICE, Liberty, British Irish Rights Watch, Committee on the Administration of Justice in Northern Ireland (CAJ) and Amnesty International

59 18 EHRR, CD 1

60 *European Court of Human Rights Survey: Thirty-five years of activity*, Carl Heymans Verlag 1995

of the numbers he had called had been recorded and communicated to the police. Following the UK Government's denial of this allegation, the European Commission ruled that it had not been satisfactorily established. It was only after evidence produced by the Post Office Engineers' Union that the Court made factual findings about the process of 'metering' and held that the practice was in breach of Article 8 of the Convention.

Another significant third party intervention occurred in the case of *Lingens v Austria*[61] concerning freedom of expression in the context of applying the Austrian defamation laws to politicians. The International Press Institute submitted evidence of a survey of the relevant law and practice in ten Council of Europe member states and in America on how far it is necessary in a democratic society to restrict the expression of opinion in the press in order to protect the reputation of the individual affected, where the individual is a politician or holds public office. It is said that this intervention is likely to have assisted the Court in reaching a unanimous landmark judgment.[62]

Nature of controls

In our view, broadly similar provisions to the Canadian rules would be useful in the English jurisdiction. The principles upon which they would be formulated are:

- no public interest intervention would be allowed without the leave of the court;
- the court would have control over the procedures for intervention in accordance with new court rules;
- the court would have the power to invite intervention from any party which in its view might assist its deliberations.

The rules which give effect to these principles must be distinct from the amendments to the existing rules which are necessary to give proper effect to the claims of interveners who come to court in their own interest – the first category which we have discussed above at page 19.

We have drafted a new set of court rules to cover public interest interventions. These are set out in the appendix. They are largely based on the Canadian rules. We propose that the onus shall be upon the proposed intervener to show in a written application that:

- the issue or issues arising in the case are a matter of public interest; and
- the intervention is likely to make a useful contribution to the proceedings.

61 Judgment of 8.7.1986, A.103

 62 Supra at 51

It will then be for the court to decide whether the intervention is likely to cause injustice or undue prejudice to the existing parties to the proceedings which outweighs the benefits of allowing the intervention. Questions of the likelihood of increasing the length and complexity of the case, and therefore the costs of the action, will be relevant factors in this decision.

In granting leave to intervene, the court may impose terms and conditions including that:

- all submissions be on paper in the first instance;
- the submission be filed with the court within a specified time limit;
- the ambit of the submission be limited to specific matters;
- the submission be limited to a maximum length.

The court will have the power of its own motion to seek an intervention by way of a written submission from a particular person or body. It will also have the power either on hearing an application or of its own motion to allow the intervener to present an oral submission.

The intervener would be entitled under existing rules to seek leave to appeal a ruling denying his or her intervention or in relation to the terms and conditions imposed on granting permission to intervene.[63] The intervener would have no standing to appeal the substantive decision in the case.

Lord Woolf in his interim report on civil litigation has recommended a comprehensive redrafting of the present court rules.[64] We would hope that our proposed new rules could be incorporated as part of this exercise.

Costs

Because 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. However, looking at the Canadian experience, it would seem reasonable to give the courts a discretion. Under the rules of the Supreme Court of Canada the court, on granting leave to intervene, is entitled to order the intervener to cover additional disbursements incurred by the parties to the case as a result of the intervention. However, such an order is not made regularly against public interest interveners. We have included a similar provision in the draft new rules.[65]

63 Under Order 59 Rule 1A as an interlocutory order and section 18(1)(h) of the Supreme Court Act 1981.

64 *Access to Justice*, June 1995

65 A submission on behalf of a number of organisations including the Public Law Project and JUSTICE proposes the establishment of a Public Interest Fund within the legal aid budget: *The public interest group's submission in response to the Green Paper: 'Legal Aid – Targeting Need' issued by the Lord Chancellor's Department (August 1995).*

Private law: public interest interventions

In private law proceedings, other than family cases, the issues for the court consist in the ascertainment of a cause of action in the plaintiff's hands against the defendant, and if the cause of action is established, what remedy should flow. In principle, the court's concern is limited to adjudicating as to the rights of the parties before it. This means that it is far less likely that issues of public interest arise in such cases. However, there are a number of private law cases which raise an issue which will have much wider implications: for example, family law cases dealing with questions of abortion and sterilisation of minors or persons with a mental disability; employment cases before industrial tribunals on such matters as equal pay or the retirement age of both sexes; and cases raising key interpretative decisions on the respective rights of an ex-wife's entitlement to share in a pension.[66] In Canada, interventions by a women's organisation[67] have been allowed in private law cases involving credit splitting under the Canada Pension Plan and the spousal support provisions of the Divorce Act 1985.

At the same time, it cannot be overlooked that some criminal cases raise important public interest issues: for example, questions of whether rape in marriage is a crime or whether consent is a defence to a consensual assault causing serious harm. Although such cases are likely to be rare, we believe that they raise very different problems, particularly in relation to the right of the accused to a fair trial. For example, there is the fundamental question of whether it would it be fair to permit an intervention which supports the position of the prosecution. We have concluded therefore that it would not be appropriate to extend public interest interventions into the criminal law without far greater research and discussion.

Present rules

Those who are directly affected, or whom for other reasons the court considers should be before it to ensure that the case can be 'effectually and completely' determined may apply to be joined as a party to the case.[68] The intention behind this is to ensure that disputes relating to the same subject matter should be determined without delay and the expense

66 In this context, it is interesting to note that the independent organisation, Financial Law Panel, is offering expert assistance to to the courts (at their request) in cases where questions arise as to the developing practices in financial markets.

67 The Women's Legal Education and Action Fund (LEAF)

68 RSC Order 15 Rule 6(2)(b)

of separate actions. A party applying to be joined in this way must (except with leave of the court) provide an affidavit showing his or her interest in the matters in dispute or the questions to be determined as between him and any existing party.

This does not allow for an intervention by a person or body who has no directly affected interest in the case. Under the present court rules there is no scope at first instance for a public interest intervention in a private law case. There are defined exceptions to this relating to the Inland Revenue Commissioners[69] and in Admiralty cases[70], but they do not advance the potential for public interest interventions. There are also cases in which the Crown has been permitted to intervene in private suits where such matters as foreign relations are affected, and in relation to public interest immunity (although, no doubt, in principle other bodies such as a company may also be permitted to intervene to object to the disclosure of documents on public interest grounds, given the court's overriding duty to supervise public interest immunity issues).

The situation is different at the appeal stage. As mentioned on page 17 the rules governing the Court of Appeal give the court power to order that the notice of appeal be served 'on any person not party to those proceedings'.[71] As O'Connor LJ said in the case of *Hasselblad v Orbinson*[72], the Rule is stated in very wide terms. In that case the court ordered that the notice of appeal be served on the European Commission as the issue concerned an alleged libel contained in a letter of complaint to the Commission. Lord Donaldson MR took the view that the court could 'order an appellant to serve a Notice of Appeal on any person without qualification', though the court would exercise its discretion having considered the contribution that the new party might make to the achievement of justice and any adverse effect it might have on the existing parties. The person so served under this rule does not become a party to the proceedings but is entitled to attend the appeal hearing and address such arguments to the court as it permits.

New rules

The rules therefore provide very limited scope for intervention at first instance in the kind of cases that we have described, whereas the rule in the Court of Appeal is, potentially at least, very wide. The question is whether private law procedures should give express recognition to the

69 See RSC Order 77 Rule 8A

70 See RSC Order 75 Rule 17(1)

71 RSC Order 59 Rule 8(1)

72 [1984] 3 CMLR 540

desirability, where it appears appropriate, of a public interest intervener coming into private law proceedings. We have concluded that the rationale behind public interest interventions is equally applicable to private and public law cases. When the case involves an important point of public interest and is likely to affect a broader section of society than the immediate parties, the arguments for allowing public interest interventions are the same as for public law cases.

The only (but significant) difference relates to the degree of prejudice that may be caused to the parties: this may be stronger where an intervener seeks to address issues of public interest raised between private parties addressing private rights. It is for this reason that the Canadian courts have sounded a note of caution on third party interventions in private law cases:

> 'The intervention of third parties into a private dispute, particularly such a personal one, should not be lightly entertained. An intervention adds to the costs and complexity of the litigation, regardless of agreements to restrict submissions. It always constitutes an inconvenience that ought not to be imposed on the parties except under compelling circumstances . . .'[73]

Similar new rules as those proposed at appendix 1 to regulate public interest interventions in public cases could also apply in private cases and thereby take these matters into account. We also consider that these (or similar) rules should apply to applications to intervene when a case is before the Court of Appeal.

Conclusion

In conclusion, therefore, the working party makes the following recommendations on the question of third party interventions in public interest cases:

- **The court rules be amended to allow a third party to intervene in his or her *own* interest in support of a judicial review application: the present rules only permit an intervention in opposition to the application.**
- **There are important advantages to be gained in the judicial process by allowing third party interventions when it is desirable for the assistance of the court on grounds of public interest. Interventions can promote a better informed court which, in turn, enhances the legitimacy of the court's decision particularly in those cases raising fundamental social and moral questions.**

73 Epstein J in *M v H* [1994] 20 OR (3d)

- The question of whether an intervention is to be allowed should be in the hands of the court: in particular, it should retain control over who may intervene and in what manner. Therefore new court rules to govern 'public interest interventions' need to be introduced (see appendix 1).
- The rationale behind public interest interventions is equally applicable to private and public law cases when the case involves an important point of public interest. However, as there is a greater risk of prejudicing the existing parties in a private law suit, interventions in such cases should be subject to particular caution.
- In general, interveners should not be vulnerable to costs. However, the courts should have a discretion to order costs to cover any additional disbursements incurred by the existing parties to a case as a result of the intervention.

CHAPTER THREE

The conventional amicus curiae

The literal and original meaning of *amicus curiae* is 'friend of the court' – that is, someone who is not a party to legal proceedings but who nonetheless participates so as to assist the court. In the English courts, the *amicus* has no interest whatever to represent save that of the court, and appears only at the request of the court.

Under present practice, the assistance of an *amicus* is sought in two sets of circumstances which overlap. The first is where the court perceives that an important point of law arises in litigation before it which for one reason or another may not be fully argued by the parties to the suit. This may happen, for example, where one party has not chosen, or been able, to be represented. It may arise where for good reasons of their own none of the parties appearing before the court desires to canvas in depth the point that troubles the judge. Or it may occur where the point in question, arising perhaps at a tangent to the main issue in the proceedings, requires special expertise which counsel briefed in the case do not happen to possess.

The second situation is where one party is not represented (or, perhaps, not adequately represented) and the court considers that in fairness that party's case ought to be fully presented.

In giving assistance to the court, the *amicus* is by definition not an adversary in the proceedings. In contrast to a person who is accepted as an intervener in proceedings to argue a standpoint in which he or she has a particular interest, the conventional *amicus* does not generally have the right or need to tender evidence or cross-examine witnesses, though the court may request otherwise. In practice, however, there is seldom any objection to an *amicus* drawing to the court's attention material which, whilst not strictly speaking evidence, may serve to illustrate the submissions and thus assist the court: although in *R v Leicester JJ, ex parte Barrow* Lord Donaldson MR doubted whether such material was admissible[74]. Orders for costs are made neither against nor in favour of an *amicus*, nor does he or she have any standing to appeal the judgment which is given.

74 1991 2 QB 260 at 283 A–D

Appointment of amicus

The traditional mechanics for the appointment of an *amicus* are reasonably well established, though they do not arise from, nor are they defined by, any rule of court. The court makes a request for an *amicus*. The majority of such requests are from the cases heard in the Crown Office List of the High Court and the Court of Appeal – more frequently the Civil Division, although the appearance of an *amicus* is not unknown in the Criminal Division. Such requests also emanate from the High Court, and more rarely the Employment Appeal Tribunal, and the Crown Court. (The Chairman has experience of seeking the assistance of an *amicus* in criminal proceedings on circuit where there was an issue as to a defendant's fitness to plead.) In the Lonrho case[75] the House of Lords requested the assistance of an *amicus* in effect to present the case for the prosecution in contempt proceedings. It is rare for an *amicus* to be requested by the County Court, and it appears to be unheard of in the Magistrates' Court.

It is important that the need for an *amicus* be identified at a sufficiently early stage. Sometimes the need is only perceived by the Judge hearing the case after the trial has started; and there are obvious consequences in terms of cost and delay if an adjournment has to be ordered. At one of our meetings the Head of the Crown Office, Lynne Knapman, very helpfully joined in our discussions. She saw no difficulty (and nor do we) in promoting an informal system, in judicial review litigation, in which the judge giving leave might indicate that the case is one where it might be desirable to appoint an *amicus*. In addition the Crown Office lawyers, who regularly prepare short notes on the case for the leave-giving judge, might put the judge on notice that the situation may be one in which an *amicus* may be needed. We do not consider that these concerns give rise to any need for formal procedures, nor that they should promote any perception that an *amicus* should be invited to participate in litigation more frequently than happens at present.

The request for an *amicus* is sent to the Attorney General (though sometimes it may be routed to him through the Treasury Solicitor). Every request is personally considered by the Attorney (or the Solicitor) General, who may in theory refuse to appoint an *amicus*; but in practice it appears that this has never occurred. Having granted the request, the Attorney then instructs the Treasury Solicitor to obtain the necessary papers from the court and instruct counsel.

Counsel chosen is usually but not always a member of the panel of barristers, maintained by the Attorney General, who are regularly

75 1990 2AC 154

instructed to act in court on behalf of government departments[76]. Not infrequently the *amicus* will be First Junior Treasury Counsel (often referred to as Treasury Devil), who (unlike panel counsel) has no private clients.

In the course of our discussions the view was expressed that this system gives rise at least to the appearance of a pro-government bias in the selection of an *amicus*, and in the way he or she is briefed – by the Treasury Solicitor, who of course acts regularly for government departments. One of the working party's meetings was very helpfully attended by Diana Babar and Philip Ridd of the Treasury Solicitor's Office and this aspect was discussed with them. It is clear from that discussion and from members of the working party's own knowledge that while counsel briefed as *amicus* is usually a member of the panel (or the Treasury Devil), that is not always the case and the choice of counsel will ultimately depend on the requirements of specialist expertise in the case. Thus in *Airedale NHS Trust v Bland*[77] Anthony Lester QC (now Lord Lester of Herne Hill) was briefed as *amicus*; not only was he not a member of the panel (which does not include Queen's Counsel), but he had argued many cases against the Government in the public law field. As regards the panel itself (and the supplementary panel of more junior counsel) it is worth noting, as the Treasury Solicitor's representatives pointed out, that only First Treasury Counsel represents government departments exclusively; all members of the panel can and do accept non-government work.

Role of amicus

Courts do not always make entirely plain the basis upon which they seek assistance of an *amicus*. In particular, it is important that counsel instructed as an *amicus* is given clearly to understand whether his or her role is to present submissions which might have been made by an absent party, or to put forward argument on a particular point of law which troubles the court, and if so what the point is.

The Treasury Solicitor acts as instructing solicitor to the *amicus*. The instructions given are based on whatever documentation has been provided by the court and deal with the legal issues on which the court has requested assistance, without any government bias. We were told that this is made clear in standing instructions to all members of the Litigation Division of the Treasury Solicitor's Department, and it conforms entirely with the experience of those of us who have been briefed as *amici*. The *amicus* cannot properly be instructed to put across a departmental line, and we are confident that that does not occur.

76 commonly referred to as Treasury counsel

77 1993 AC 789

However we consider that there remains a presentational problem. Particularly in a case where one party is the prosecution in a criminal case, or (as may well happen) a government department is already represented by Treasury panel counsel, it may be difficult for the other party in the litigation to accept that the *amicus* who is brought in – also Treasury counsel and instructed by the Treasury Solicitor – is truly independent from his opponent. In such a case the Treasury Solicitor may be giving instructions both to counsel for a government department and to the *amicus*. Where that happens there is, as it were, a Chinese Wall between different members of the Treasury Solicitor's Office. In cases of this kind, we consider that counsel instructed as the *amicus* need not necessarily be on the Treasury panel.

However these qualifications to the established system for the appointment of an *amicus* are at that system's edges, and generally we consider that the system works well. In the context of our more general discussion relating to third party interventions, we would emphasize that in our view it is of great importance that the regime relating to the conventional *amicus* should be clearly and firmly distinguished from any procedures regarding public interest interveners.

Conclusion

The working party reached the conclusion that the present system of appointing a conventional *amicus curiae* to assist the court generally works well.

Appendix

Draft new RSC Order 53 Rule 9(1)

9.– (1) On the hearing of any application for judicial review any person who desires to be heard *either in support of or* in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard.

Draft new RSC rules: Applications for public interest interventions

Leave to intervene

1.– (1) A person who wishes to intervene in an application for judicial review must file a notice of application in the Crown Office for leave to intervene and serve a copy of it on all the parties.

(2) An application for leave to intervene must state briefly –

(a) the name and description of the intervener,

(b) the issue or issues in the proceedings which raise a matter of public interest,

(c) the issue or issues to be addressed by the intervener,

(d) the propositions to be advanced by the intervener, their relevance to the proceedings and the reasons for believing that the submissions will assist the Court.

(3) The Court shall not grant leave unless it is satisfied that –

(a) the proceedings raise a matter of public interest, and

(b) the intervention is likely to assist the court.

(4) In determining the application, the Court shall consider whether the intervention will unduly delay or otherwise prejudice the rights of the parties including their potential liability as to costs.

(5) Unless otherwise ordered by the Court, the application for leave shall be determined without a hearing by a Judge who, at his discretion, may invite representations from the parties.

(6) Unless otherwise ordered by the Court, an intervention –

(a) shall be in the form of a written submission that does not exceed 20 pages;

(b) shall not be presented by way of oral argument.

(7) Without prejudice to (6) above, the Court may grant leave to intervene upon such terms and conditions as it considers just, including making provisions as to additional costs and disbursements incurred by the parties as a result of the intervention.

(8) The order granting leave to intervene shall specify the date by which the written submission must be filed.

(9) Nothing in the foregoing provisions shall be taken as affecting the power of the Court to request the assistance of a person in an application for judicial review in such manner and on such conditions as it thinks fit.

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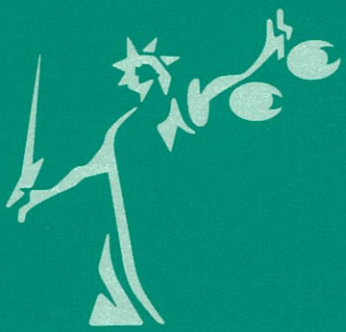

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