

**'Judicial Review and Test Case Strategies' – Seminar 4 Minutes**  
**(Minutes taken under Chatham House Rule)**

**The Public Law Project**  
*(in association with the Department of Law,  
Queen Mary, University of London)*

Date: 23 November 2006

Location: IALS, Room L101

In Attendance:

1. Sir Henry Brooke	Former Vice-President, Civil Division of the Court of Appeal
2. Andrew Le Sueur	Queen Mary, University of London
3. Caroline Stone	PLP – Minutes
4. Michael Fordham	Blackstone Chambers
5. Jonathan Lewis	Civil Appeals Office Lawyer
6. Andrea Loux	Roehampton University
7. James Welch	Liberty
8. David Wolfe	Matrix Chambers
9. Varda Bondy	PLP
10. Conrad Haley	PLP
11. Hannah Jones	PLP
12. Louise Whitfield	PLP

## **Introduction**

Chair: The subject being addressed in Seminar 4 – the role of the third party interventions – is one which has cropped up throughout the seminars and merits being dealt with in its own right.

## **Speaker 1**

Paper set out below (incorporating additional comments made during presentation).

# **INTERVENTIONS IN THE COURT OF APPEAL<sup>1</sup>** **BY SIR HENRY BROOKE<sup>2</sup>**

## ***Introduction***

1. Nearly forty years ago my wife and I owned a beautiful terraced house close to the top of the hill in Hampstead Village. It was well over 300 years old, and the local builder always advised us not to go rooting behind the outside skin of the walls of the house unless there was something very clearly wrong. If we did so, he said, we might well find things that would have been best left alone for another hundred years.
2. I have felt a bit like this when preparing this paper. I remember that we discussed interventions about eight years ago at one of the plenary meetings of the Court of Appeal that takes place at the start of every legal term. In those days the House of Lords had been showing itself willing to accept interventions in appropriate cases, and the question arose whether we should permit them in the Court of Appeal, and if so in what terms. As a relatively new Court of Appeal judge, I had not at that time encountered the practice in the Court of Appeal, but it was not completely unknown.
3. We decided as a matter of policy to let matters flow. We should neither encourage interventions nor discourage them. The last thing we wanted was for the procedure to be bound up in red tape. If we went down the formal route before we had had proper experience of the occasions when interventions might or might not be welcomed, we feared that we might either be unduly prescriptive or unduly relaxed in the rules we formulated. And if we said that a formal application was always necessary, it was almost inevitable that a fee for making the application would always be demanded. We hoped that we might avoid this necessity by adopting a laissez-faire approach.

## ***The practice of courts at different levels***

4. The House of Lords, whose business is tiny compared with the business of the Court of Appeal, went down the formal route. Practice Direction 37 of the *Practice Directions Applicable to Civil Appeals* (January 2006) is entitled “Interveners”.<sup>3</sup> It provides:
  - “37.1 Participation in an appeal as an intervener in a court below does not entitle a person to intervene in the House of Lords.
  - 37.2 Application for leave to intervene in an appeal must be made by petition, together with the prescribed fee. The petition may only be lodged after the petition of appeal has been presented to the House. One master plus seven copies of the petition for leave to intervene must be lodged. The petition must indicate whether leave is sought for both oral and written interventions or for

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<sup>1</sup> A paper delivered on 23<sup>rd</sup> November 2006 at the Institute of Advanced Legal Studies at the fourth and final seminar in a series organised by the Public Law Project and the Department of Law at Queen Mary’s College, London University on the general theme of “Judicial Review and Test Case Strategies”.

<sup>2</sup> Sir Henry Brooke was Vice-President of the Court of Appeal (Civil Division) until his retirement from the Bench on 30<sup>th</sup> September 2006. He now practises as an arbitrator and mediator from Fountain Court Chambers, Temple EC4.

<sup>3</sup> This practice direction is conveniently set out in Volume 2 of the 2006 White Book at p 1572.

written intervention only. The petition should be certified with the consent of the appellants and respondents in the appeal. If their consent is refused, the petition must be endorsed with a certificate of service on them. All petitions for leave to intervene, whether or not opposed by the parties in the appeal, are referred to an Appeal Committee.

37.3 Subject to the discretion of the House, interveners bear the costs of their intervention.

37.4 Subject to the discretion of the House, any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal.

37.5 If the Crown has been joined to proceedings in the court below in accordance with the provisions of s 5 of the Human Rights Act 1998, the leave of the House is not necessary for the continued intervention of the Crown (direction 33.5).

37.6 For interventions in petitions for leave to appeal, see direction 3.21.”

The prescribed fee for a petition for leave to intervene is currently £570.

5. For judicial review proceedings in the Administrative Court the procedure is much less formal. By CPR 54.17(1)(b) any person may apply for permission to make representations at the hearing of the judicial review. The Practice Direction to Part 54 looks as if it was devised post-Bowman reforms. It provides some structure for intervention, though this is not very formal. By paragraph 13.1 to the Practice Direction to Part 54, such an application may be dealt with without a hearing where all the parties consent. Paragraph 13.3 provides that an application for permission should be made by letter to the Administrative Court office, identifying the claim, explaining who the applicant is and indicating why and in what form the applicant wants to participate in the hearing. It should be noted that the applicant does not become a party, or even an “interested party”. Paragraph 13.5 of the Practice Direction refers to “applications to intervene”, and it appears that the court refers to such applicants as “interveners” without this word appearing formally in the Rules. It follows that an “intervener” in the Administrative Court does not automatically fall within the definition of “respondent” when the matter reaches the Court of Appeal, because he was not a party to the proceedings in the lower court within the meaning of CPR 52.1(3)(e)(i).
6. So far as the Court of Appeal is concerned, at the third of the seminars in this series I expressed surprise at the news that the Civil Appeals Office has been charging fees in relation to applications to intervene, because that had not been my experience. My practice, in cases where I thought that leading organisations in the field might have an interest in a newly developing field of law, would be to invite the Office to write to organisations that they knew to be interested in such topics as CFAs or ATE insurance, and ask if they wished to intervene.<sup>4</sup> Alternatively applications of this kind would be received by letter by the Office and referred to me for an informal direction. My practice was to permit a written intervention, so long as it was filed within a prescribed timetable, but to require a further reasoned request if permission was sought for a hearing in court.
7. The arrangements seemed to work very well, and I only recall refusing a request on one occasion, when someone who had formed herself into a limited company as a single issue pressure group sought to intervene on an issue of statutory construction of modern social legislation when there was no evidence that she had the legal acumen to assist the court to

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<sup>4</sup> For example, I followed this practice in *Sarwar v Alam* [2001 EWCA Civ 1401; [2002] 1 WLR 125, the first case which raised issues about BTE insurance under the new litigation funding regime introduced by the Access to Justice Act 1999.

any material degree. In the event a much larger organisation independently sought and was granted permission to intervene in that case.

8. The discussions at this series of seminars prompted me to do what my builder was so anxious that I should not do, and start prying behind the wainscoting in the Civil Appeals Office. I am very grateful to David Gladwell, as Head of the Office, and to my former judicial assistant Jonathan Lewis, who is now one of the Office lawyers, for providing me with the information that forms the bulk of this paper. It told me a lot that I did not know.

### *Statistics and examples of interventions*

9. I first asked for statistics about interventions, and for a snapshot of what is happening in the Court of Appeal today. Unsurprisingly, in view of this policy background, no instructions have ever been given to the designers of RECAP, the Civil Appeals Office's excellent electronic management tool, to take steps whereby applications to intervene might be readily identified. Everything I say is therefore on an E & OE basis. I have been told that it is likely that such instructions will now be given, so that it ought to be possible to obtain relevant statistics reasonably easily in future.
10. It appears that since January 2001 there may have been 67 *formal* ancillary applications to intervene: 10 in 2001; 13 in 2002; 8 in 2003; 15 in 2004; 13 in 2005 and 8 in 2006. In addition, there have been the informal applications to which I have referred. These may be very informal indeed, for example, when permission to intervene was given in the lower court and similar permission is granted in the Court of Appeal almost as a matter of course. Interventions are certainly on the increase.
11. A study of transcripts of the court's judgments in 2005 shows that there were about 45 interventions in the Court of Appeal that year. It is not always clear from the transcripts whether or not the intervention was restricted to written submissions. There appear to have been about 20 interventions so far in the current year.
12. I will give 11 examples of interventions since January 2005. Seven of these were in courts in which I was sitting. When I refer to an intervention "at the hearing" the court also had the benefit of prior written submissions.
  - *Bowman v Fels*<sup>5</sup> where the Bar Council, the Law Society and the National Criminal Intelligence Service intervened at the hearing. I will return to this case later.
  - *Harb v King Fahd Bin Abdul Aziz*<sup>6</sup> where the Secretary of State for Constitutional Affairs intervened at the hearing.
  - *Regina (Al-Skeini and others) v. Secretary of State for Defence*<sup>7</sup> where the Redress Trust and the Aire Centre intervened by way of joint written submissions.
  - *R (D) v Secretary of State for the Home Department*<sup>8</sup> where Inquest intervened.
  - *H v Suffolk County Council*<sup>9</sup> where the Secretary of State for Constitutional Affairs intervened at the hearing on a Human Rights Act compatibility issue.
  - *R (Countryside Alliance and Others) v The Attorney General and Others*<sup>10</sup> where the RSPCA intervened at the hearing.

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<sup>5</sup> [2005] EWCA Civ 226 (8 March 2005).

<sup>6</sup> [2005] EWCA Civ 1324 (9 November 2005).

<sup>7</sup> [2005] EWCA Civ 1609 (21 December 2005).

<sup>8</sup> [2006] EWCA Civ 143 (28 February 2006).

<sup>9</sup> [2006] EWCA Civ 395 (12 April 2006).

<sup>10</sup> [2006] EWCA Civ 817 (23 June 2006).

- *Deborah Garrett v Halton Borough Council*<sup>11</sup> where the Law Society intervened at the hearing.
  - *K Ltd v National Westminster Bank Plc*<sup>12</sup> where the Serious Organised Crime Agency and HM Customs and Revenue intervened at the hearing.
  - *Jonathan Luke Rogers v. Merthyr Tydfil County Borough Council*<sup>13</sup> where the Law Society and two ATE companies intervened at the hearing and a number of other companies intervened with written submissions. I will refer later to certain aspects of this case.
  - *Secretary of State for the Home Department v MB*<sup>14</sup> where JUSTICE intervened by way of written submissions.
  - *R (Al Rawi & Others) v The Secretary of State for Foreign and Commonwealth Affairs & Anor*<sup>15</sup> where the UN High Commissioner for Refugees made written and oral submissions.
13. There were seven interveners in one case: *R (Burke) v The General Medical Council*<sup>16</sup> where the Secretary of State for Health, the Official Solicitor, the Disability Rights Commission, the Catholic Bishops' Conference of England and Wales, the Medical Ethics Alliance, Alert, the British Section of the World Federation of Doctors Who Respect Human Life, Patient Concern and the Intensive Care Society all intervened. It is noteworthy that in a footnote to their judgment in that case the court said,<sup>17</sup> as to the last seven of these interveners:
- “We have referred to matters put before us by three interveners: the Disability Rights Commission; the Medical Ethics Alliance and the Intensive Care Society. We mean no discourtesy to the other interveners when we observe that a great deal of their thoughtful and well-presented contributions falls victim to our general view that this litigation expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case. In so far as the interveners directly addressed the issues which we have addressed in this judgment, we hope that our conclusions are clear.”
- Intervention in *Burke* was a matter of people wanting to latch on to a case in order to get judicial pronouncement on matters which did not sit squarely within the four corners of the case being brought.
14. In *Bowman v Fels* we were persuaded that it was appropriate for us to continue hearing the appeal, in which all three interveners were represented by leading counsel, even though the appeal was in a private law matter and we discovered that the private parties had settled their underlying dispute. *Bowman* raised the question of whether lawyers needed to report possible criminal offences which were disclosed in circumstances of legal professional privilege. The parties settled but managed to agree a crisp point of public law which they wanted decided.
15. In *Rogers v Merthyr Tydfil CBC* the appeal was from a decision of a much respected deputy circuit judge, his Honour Graham Jones, which, I was told, was being widely followed in assessments of costs concerned with the level of ATE premiums in small civil claims. Because the respondent council was self-insuring, it had no interest in the wider concerns of the liability insurers' market while ATE insurers were queuing up to make representations. I therefore asked if liability insurers would be interested in intervening. I was anxious to hear

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<sup>11</sup> [2006] EWCA Civ 1017 (18 July 2006).

<sup>12</sup> [2006] EWCA Civ 1039 (19 July 2006).

<sup>13</sup> [2006] EWCA Civ 1134 (31 July 2006).

<sup>14</sup> [2006] EWCA Civ 1140 (1 August 2006).

<sup>15</sup> [2006] EWCA Civ 1279 (12 October 2006).

<sup>16</sup> [2005] EWCA Civ 1003 (28 July 2005).

<sup>17</sup> At para 82.

the other side of the story if I was going to resolve an important point of principle. In the event they made some very helpful written submissions, but they did not wish to be heard in an appeal which related to one corner of the market only. The ATE insurers' interventions in that case were at three different levels. Some simply wrote a letter to the court explaining their position in response to the letter inviting interventions, but took no further action. Some sought to confine their participation to written interventions. And two of them banded together to instruct leading counsel to make both written and oral submissions.

### ***Methods of Application***

16. I turn now to the present practice of the Civil Appeals Office in relation to interventions. Where a party has intervened at first instance, it is usually treated as if it were a respondent in the appeal. It is not customarily required to make any further application (so long as the first instance court has not limited the terms of the intervention).
17. At present there are three methods by which a party may apply to intervene in the Court of Appeal. The first is by way of formal application. Under paragraph 11 of the Practice Direction to CPR Part 52 applications in a matter before the Court of Appeal should be made either in the appeal notice or by a Part 23 application notice. Part 23 talks about 'parties' – it does not deal with this new animal who does not want to be a party/interested party to proceedings. Practice Form N244, whose use is permissive for Part 23 applications (see para 2.1 to the Practice Direction to CPR Part 23), is always used, and the prescribed fee (at present £200) is required. Two copies of the form and any supporting documentation will be required for the court file, together with one copy for the applicant and a copy for each of the parties to the appeal.
18. The school of thought within the Office that supports this approach believes that all potential interveners have to appreciate that there is no automatic right to intervene, and that they cannot be exempted from procedures that would apply to other parties simply because they believe that they are serving a higher public interest.
19. The technical difficulty with this approach lies in the fact that it is not at all clear whether paragraph 11 of the Practice Direction refers only to those who are *already* parties to an appeal, as opposed to those who are seeking permission to become interveners. Moreover, the N244 form refers only to the parties and their solicitors and requires documentation that only the parties are likely to have. On the other hand, para 2.1 (4) of the Practice Direction to CPR 23 is drafted in terms that envisages that the applicant may not already be a party.
20. The second form of application is by letter. An application by letter is made to the Court in the same way as applications are made in the Part 54 proceedings in the Administrative Court, and it is dealt with in the same way. This is the practice usually followed in family law appeals, and is the practice which I believed was universally adopted until I started to inquire into these matters when preparing this paper.
21. By a hybrid practice, a party wishing to intervene may write enquiring as to how to do so. It may be advised either to follow the formal route or the informal route, depending on the person within the Office to whom the request is made.
22. To sum up, what my inquiries have revealed is that in the absence of an express rule or practice direction similar to those in use in Part 54 proceedings there seems to be no consistency on the way in which applications to intervene are handled within the Office. In some cases a request by way of letter has been sufficient, while in other cases the formal

application procedure set out in CPR Part 23, along with the appropriate fee, has been required.

23. It appears that one very senior lawyer, who had immense experience of practice within the Office, decided shortly before he retired in June 2006 that the formal application procedure should be followed in the Court of Appeal, at any rate for the public law cases<sup>18</sup> that were in his area of responsibility. Note, that this is only the policy of one lawyer. One of his reasons was that a party who had not sought to intervene at first instance but who sought to intervene in the Court of Appeal should be under some obligation to explain the failure to intervene at first instance or to explain why intervention at that stage was not appropriate but is now being sought on the appeal. It is of course well known that the importance of a case – or even its existence - only becomes apparent after it has been heard in the Administrative Court and the judgment reported, and there may be plenty of good reasons why a public interest group becomes interested in a matter for the first time when it reaches the Court of Appeal.

### ***Consideration of the Application***

24. If the case has not yet been allocated to a particular constitution, the application for intervention will be determined on paper by a single lord justice (usually the supervising lord justice with responsibility for that area of the court's business, or the presiding lord justice to whose division of the court the case is probably destined from the time it arrives in the Office). If a constitution of the Court is already seized of the matter, the application will be referred by the Office to the presiding lord justice for determination.
25. Each matter will be dealt with in whatever is the most practical manner. The procedure of the Court in such cases is likely to be exercised with a degree of flexibility. In the majority of cases, following consideration by the single lord justice, an order will be drawn to convey the Court's decision. This is, however, dependent on the length of time between the application being filed or made and the hearing of the substantive appeal.
26. A hearing of the application to intervene will only be convened when directed by a lord justice or if a party requests a review under CPR 52.16(6) of the decision made by the single lord justice on paper. The phrase "a party" in that sub-rule is further evidence that the rules were not drafted to cater for someone who is not, and who has no wish to become, a party in any formal sense. This seminar has now brought to light inconsistent practices.

### ***Contents of the Application***

27. When an application is required under current practice, it is customary for the Office to insist that it should contain the following information:
- Information relating to the applicant (e.g. what the applicant's interest in the matter is, why the applicant is seeking to intervene and whose views the applicant represents).
  - An explanation as to why the applicant did not seek to intervene in proceedings before the lower court and what has subsequently transpired to have made it necessary for an application to be made at this stage.
  - Argument as to why the applicant should be allowed to intervene.
  - Details of the intervention that is proposed (is the applicant proposing to intervene by way of written submissions only, or is the applicant also seeking to make oral submissions at the appeal hearing?).
  - For written submissions, confirmation as to the proposed length of any submissions.
  - A maximum time estimate for any oral submissions (if any) and details of counsel (if possible).

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<sup>18</sup> Family proceedings, in contrast, positively discourage formal procedures.

- An indication as to whether the time estimate for the appeal agreed by the existing parties and the Court will be jeopardised by the applicant's submissions.
- Submissions as to the costs of the intervention (i.e. will the intervener bear its own costs?).
- A short skeleton argument containing the submissions which the applicant intends to make if the application is granted and any documents in support of those submissions on which the applicant intends to rely.

### ***Views of the Other Parties***

28. The Civil Appeals Office will expect the applicant to obtain the views of the other parties to the appeal as to the application to intervene, if they have not already done so (as is usually the case). If the views of the other parties do not accompany the application, the Court is unlikely to consider the application to intervene unless and until they are obtained. The concern will be whether the intervention will make the proceedings longer and/or more expensive.
29. If the application is made seven days or less prior to the hearing of the substantive appeal, the applicant will be expected to provide the views of the other parties to the proposed intervention at the same time as the application is filed. It is likely that the Court will allow the intervention.

### ***Costs***

30. It is for the applicant to decide on its own position as regards costs. There is no presumption that applying to intervene is risk free in terms of costs.<sup>19</sup> In my experience, costs are never sought from an intervener, and an intervener never asks for costs. Often, when granting permission to intervene, the Court will direct that the intervention may only take place on the basis that the applicant bears its own costs of the intervention. 'Costs following the event' does not apply because the intervener is not a party to the case. However, Court has a wide discretion to order any costs it sees fit under the Supreme Court Act.

### ***Conclusion***

31. It is now quite clear that the position should be looked at again. Given that the civil justice system is required by the Treasury to be self-financing, and at present contested public law proceedings are heavily subsidised by the fees charged to litigants in undefended debt cases, it would seem inevitable that if it is decided to make the procedure more formal an accompaniment to formality will be a requirement that every would-be intervener in the Court of Appeal should pay a fee for applying to intervene, whether or not it was an intervener in the court below.
32. Whether it will be possible to fix the fee at a rate lower than £200 will depend on the policy considerations applicable when any new procedure is decided on. As I have shown, different interveners wish to intervene at different levels. In the *Conjoined Twins* appeal,<sup>20</sup> for instance, the Cardinal Archbishop of Westminster composed and posted to the court the written submissions which he requested the court to take into account. A pro-Life organisation, for its part, was given permission to instruct leading counsel to intervene by written submissions only while the appeal was in progress.

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<sup>19</sup> Even though an intervener is not a party, the Court of Appeal has a wide discretion as to whether to order costs to be paid by a non-party; see s 51(1) of the Supreme Court Act 1981 and *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.

<sup>20</sup> *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147.

33. Last year the civil justice system made a net profit of £34 million from litigants' fees (if one excludes civil proceedings in magistrates' courts). A case could therefore be made for charging a lower fee, especially when the interventions are usually directed towards making obscure law clearer for everybody, or for charging a fee on a sliding scale depending on the level of intervention requested.
34. But that is for tomorrow. I have been concerned to describe what is happening today, and why things have been happening in what a purist might regard as a rather haphazard way. It is a shame that the process of taking off the outer skin of wall to see what is going on behind, as I have been required to do when preparing this paper, always tends to make things more expensive.



Response to points raised in paper

Speaker 2:

- PLP have been attempting to write a 'Good Interventions Guide' for interveners. In this regard, it is gratifying to hear that someone else has met with confusion when trying to fathom the current status quo. This confusion has made writing a practical, definitive guide a bit more difficult than originally anticipated.
- Fees and formality of procedure – PLP have only recently become aware of the N244 procedure and accompanying fee. It appears to be an attempt by the Civil Appeals Office to shoe-horn interventions into the straightjacket of a formal process.
- Speaker 2 is not convinced by the reasons given in support of a formal process: (i) interveners do not believe they have an automatic right to appear in court proceedings, (ii) similarly, nor do NGOs consider themselves free to disregard formal court procedures; (iii) in terms of defendants potentially contesting intervention, this objection falls away in situations where an intervener obtains the agreement of all parties.
- In the course of past work on interventions, PLP had access to Administrative Court files and received funds to collect details of pending cases which were then put on the PLP website. Whilst this was a valuable initiative, it was very time consuming and expensive and thus would be a difficult exercise to repeat.
- Speaker 2 queried the need to give a reason for failure to intervene at first instance. The reasons are so multifarious – how does one define what's a good/bad reason? Failure to intervene may be due to any of the following:
  - An organisation's resources are finite, so they may choose to keep their powder dry and wait to intervene in a higher court, where the judgment will be of greater precedent value;
  - A potential intervener may be warned off by the other side;
  - Sometimes one is unaware of the importance of a case until the later stages, once argument has developed further;
  - Lack of awareness of the case until it is too late to intervene.
- The uncertainty over the 'status' of an intervener is problematic. An intervener is not an interested party, and as a result they are not served with any court documents and they have no

right to appeal against the final decision. Are they able to avail themselves of the other procedures under the CPR?

- Costs are very relevant – either of the intervention itself, or the potential risk of an adverse costs order. It is strange that one has to pay for the privilege of assisting the Court. Set at the level suggested, the fee would certainly be a disincentive for interveners. Speaker 2 was aware of reputable organisations who had been threatened with costs by the Government, which has, in turn, influenced the way they have responded to the litigation in question. PLP, in fact, were threatened in *Corner House*, as a means of discouraging our intervention. A statement of principle on costs would be welcome: for example, that if one complies with the court's timetable, an intervener will face no risk of costs. There is definitely a need for consultation, both as to any proposed introduction of a formal process, and the level of any accompanying fee.

## DISCUSSION

Speaker 3:

- As Counsel for the DRC in *Burke*, I wish to clarify that the Commission were not an example of bad interveners; nor if you read the judgement carefully is that the allegation made by the Court of Appeal. The comments cited in paragraph 13 of the Speaker's paper are in fact more a criticism of the judge below, for unnecessarily broadening the scope of the case. The Commission kept their intervention to matters raised by the facts of the case.

*Awareness of cases in which intervention might be appropriate*

Speaker 3:

- The relatively ad hoc nature of the process and inequality of approach by the Civil Appeals Office is a worry. It makes the publicising of cases very important. As the Court's processes become more computerised and there is greater transparency/access to information through the Freedom of Information Act, this problem of publicity should be easier to resolve.
- Is there a way of encouraging the practice of soliciting intervention, whilst, of course, paying due care to balance the representations made on both sides?

Speaker 1:

- Since I was asked to sit on *Callery v Grey*, I have been policing the areas of ATEs as it was apparent that (on the basis of one bad precedent) the lower courts were making inconsistent decisions, none of which ever reached the Court of Appeal. That is what dictated my particularly practical approach.

Speaker 4:

- Information: interveners either know too little, or too late, particularly in the area of immigration and asylum. In terms of relying on the Court of Appeal to take a proactive approach, given the Court of Appeal's caseload, one cannot trust that something will not get missed. A simple idea would be for the claim form to include a box which asks 'does your case raise an issue under the Refugee Convention?' If the applicant ticks this box, they would then be under an obligation to inform the UNHCR, who could consider intervening (*cf.* at a lower level, i.e. the Immigration Appellate Authority level, the UNHCR have a statutory right to intervene). This would cost the system nothing. Such a classification process already occurs in the case of HRA claims. Alternatively, if applicants were asked to summarise in a sentence what their case concerned, this could then be published on a public website. Any such system would need to

cater for anonymity where sensitive subject matter is involved. Of course, the success of any such 'publicity' would depend on how territorial NGOs are when contemplating intervention.

Speaker 5:

- The House of Lords do produce a document providing details of forthcoming cases, but the reality is that there is never sufficient time to read it. As such, I wonder whether there would be enough time to read a website or some other mode of disseminating the relevant information?
- It would be useful to know which cases other bodies are intervening in, as this can be a helpful indication that the case in question is significant. E.g. Liberty recently discovered that the Government are intervening in a Dutch case, (in an attempt to limit *Chahal*), only because the press were informed via an article in the Guardian.

Speaker 1:

- In terms of technology, once claim forms come in electronically, I can see no reason in principle for not making public certain information. However, the difficulty of disseminating information about immigration cases will simply be the extreme level of applications.

*Formality of procedure and cost of intervening*

Speaker 4:

- It would be disastrous if this new initiative (i.e. examination of the Court's processes) leads to formality and fees. Further, I am not sure what the justification for this would be? If you simply need to intervene by way of witness statement (as recently occurred in a case of mine where ILPA wished to raise certain additional points in support of the claimant's claim) or supplied written submissions, where is the need for formality? It is also possible to write academic articles which can then be cited in court. Problems only arise if the intervener is not wholly behind the claimant's case.

Speaker 6:

- The concept of intervention is not included in the CPR, other than a brief reference in Part 54. It must be borne in mind that intervention covers a large group of bodies. The advantage of flexibility is that the system can treat diverse interveners differently.
- Can there not be a means of the intervener simply assisting the claimant more directly?

Speaker 5:

- With regard to obtaining the consent of the other parties, the Government are normally careful to frame their response in neutral terms; whereas interveners can usually assume claimants are on the same side and so will permit the intervention. I have had a last-minute intervention where the claimant solicitor objected to our intervention and hence prevented our participation. Had there been sufficient time, we may have been able to get an oral hearing to resolve this matter. *Is notification enough or do you have to get the consent of the parties?* This is an important distinction, as in the House of Lords, the fees are less (£270 cf £500) if all the parties consent – hence why the Government are so careful to frame their response to the proposed intervention in neutral terms!

Speaker 1:

- Regarding fees, there is a sense in Government that purchasing civil justice is just the same as purchasing any other commodity and should be paid for accordingly. The economic costs of judicial reviews are huge, but at the moment the punters are not paying for it, rather it is the

consumers of British Gas via the high fees charged for undefended debt collection claims. One reason why judges are keen on informality is that it encourages applications. There will undoubtedly be a cold Treasury wind if there is any attempt to make the process more accessible.

#### *Role of the 'amicus'*

Speaker 4:

- Cases where there is a vacuum of information: where the Court knows a point is not being raised, traditionally the practical solution is for the Court to request an *amicus*, appointed by the Attorney General. The call for an *amicus* is, however, entirely self-policing. In a recent inquest, the *amicus* took the view that because he did not conscientiously believe in the submissions he was being asked to make, he could not make them. As a result the Court of Appeal only got one side of the story, which was unacceptable.

Speaker 6:

- Speaker 6 was involved in a recent appeal which raised an important point of law, however, the case lacked an appellant, as the prisoner claimant had died and there was no estate. Therefore an Advocate of the Court was appointed. Under the CPR, their role was to represent both sides of the case, yet he took it upon himself to only present a one-sided view of the case.

Speaker 1:

- As a matter of policy, the Bar Pro Bono unit undertakes to give representation to any Court of Appeal litigant-in-person. The *amicus* is the obvious source to fill any gap of information and in the instances cited, the judge should have asked for more clarification where the submissions were one-sided.
- Recourse to Law Commission Reports is always helpful, as they encapsulate the views of a wide range of people. Personally, I have always welcomed contributions from whoever, as one needs a great deal of help when law-making, which is effectively what interpreting the law sometimes amounts to.

#### *Subject matter of interventions*

Speaker 2:

- With the increase in interventions and the Court seeking out interveners, will the Court be prepared to venture into different areas, for example, social policy?

Speaker 1:

- Traditionally the Courts are there to decide the issues between the parties. Difficulties of cost-shifting will arise if the Court invites a battalion of NGOs to intervene. The real world is that the defendants will then begin asking for costs from NGOs. If this practice developed, I can also see the State becoming much more aggressive with regard to interventions.

Speaker 4:

- The twist is that there are numerous cases where the Secretary of State intervenes, stating that an important point of policy is raised. This often widens up a narrow case, necessitating intervention by NGOs.

### *Purpose of interventions*

Chair:

- If interventions become more routine would that change the public perception of litigation and public law. Is there a risk that intervention will become political lobbying?

Speaker 7:

- Would think that this is what the public already believe – it is unlikely they distinguish between what judges do, i.e. applying the law, and political campaigning leading to a certain result. For example, one only needs to look at how the BBC reported the ECJ's decision in the case concerning the VAT position of cigarettes and alcohol purchased online. The UK Government, like most European governments, intervened in this case and the perception, as conveyed by the BBC, was that the outcome was as a result of political lobbying and pressure, not legal argument.

Speaker 6:

- It is naïve to say that there is not a sense of policy behind interventions. One should accept that at some level this is true and start from a place that interventions are a cost-effective form of lobbying/campaigning. £200 guarantees that your cause gets to be on TV that night.

Speaker 7:

- Intervention is about assisting the Court and the Court's discretion to refuse a case is based on this. It is important to be careful that this is the starting point when asking these questions. In Canada, there is an insistence that the points made by interveners are different to those being made by the Claimants, which is why interveners serve their documents last.

Speaker 5:

- My response would be, firstly, that we can get on TV anyway! But more importantly, the point raises a qualm I have about whether the judiciary are willing to accept interventions on that basis, i.e. where the intervention is closer to 'making a point'? Speaker 5 is keen to explore the question of 'what the point is of an intervention'? It could be because (i) the intervener feels they have knowledge or information which should be put before the Court; (ii) the intervener wants to put forward arguments which would otherwise not go before the Court, in part due to inadequate lawyers and/or (iii) the intervention is a marker of the significance of the case, e.g. if it raises important constitutional matters. Interventions are not always on the side of the claimant – sometimes they are more left of field, or suggest a middle route. Either way, they open up cases.
- In the House of Lords, you have to put in an intervention at the same time as the respondent, which means that you are in a fairly absurd position of not knowing what you are responding to.

Speaker 4:

- In terms of using interventions to 'make a point', markers are put down the whole time and it is important to draw cases to the Court's attention. The Government do it – the Attorney General is brought in to lead in order to show the Court how important a case is and that the Government is watching its outcome. In one of my cases, the previous Attorney General turned up to give a 15 minute opening speech about policy before another QC was to take over. The Court immediately interrupted him to ask about the substantive case (of which he knew little!), which demonstrates that they were precisely aware of what the A-G was doing.

Speaker 5:

- The torture case, *A (No. 2)*, was very significant. 11 NGOs intervened, which was a clear marker of the constitutional importance of the case. The downside was that there were an enormous amount of negotiations between the NGOs about the right way to intervene, which became quite unwieldy. By way of contrast, the ECHR in *Ramsey* take quite a strict approach about wanting only joint interventions. The truth is that there are problems with both approaches.

Speaker 1:

- Certainly the courts seem to want co-operation wherever possible.

*Conclusion*

Speaker 1:

- The Civil Appeals Office are aware that the procedure surrounding intervention is something which must be looked at. However, I am rather pessimistic that a non-fee system can be devised.

4 December 2006