PUBLIC INTEREST INTERVENTIONS IN THE SUPREME COURT: TEN VIRTUES

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Introduction

1. The United Kingdom's new Supreme Court opened for business in October 2009, the Justices having left the Committee Rooms of the House of Lords and crossed Parliament Square, to their swanky new IT-filled Courtrooms. We can safely take it that it is as though the new Court bore the following sign, etched into the glass at the entrance doors: "*Public Interest Interveners Welcome*".

2. In his excellent recent JUSTICE report "*To Assist the Court: Third Party Interventions in the UK*" October 2009[1], Dr Eric Metcalfe describes the well-established pattern of public interest interventions in the old House of Lords, where 21 of the 75 judgments handed down in 2008 had involved third party interventions (Metcalfe n.3). That Court had travelled a long way since its peremptory refusal to allow the Children's Legal Centre to intervene in *Gillick* [1986] AC 112 (Metcalfe §15).

3. The last ever HL judgment involved an intervention by the Society for the Protection of Unborn Children (see *Purdy* [2009] UKHL 45: assisted suicide); and the first appeal heard in the new Supreme Court included an intervention by JUSTICE itself (*A (HM Treasury)*: anti-terrorism asset-freezing). The new *Supreme Court Rules 2009* (SCR) allow applications to intervene to be made by "*any official body or non-governmental organization seeking to make submissions in the public interest*" (SCR r.26(1)(a)).

4. Interventions have involved very many national and international non-governmental organisations, and public bodies, including many multiple intervention cases (Metcalfe n.41). For example, in *Van Colle* [2008] UKHL 50 (civil liability and witness protection) there were interventions by the Home Secretary; by four NGOs (JUSTICE, MIND, INQUEST and Liberty); and by

[1] available at www.justice.org.uk/publications/listofpublications/index.html

the Equality and Human Rights Commission. In *YL* [2007] UKHL 27 (human rights in private care homes) there were interventions by the Constitutional Affairs Secretary; by JUSTICE, Liberty and the BIHR; by Help the Aged and the National Council on Ageing; and by the Disability Rights Commission. Long may it continue.

5. Unfortunately, the Supreme Court has retained an intervention fee, which was £570 in the House of Lords and is now £800 in the Supreme Court. The relevant instrument (Supreme Court Fees Order 2009 Sch 2) gives to the Chief Executive of the Supreme Court the important power to reduce or remit the fee where a proposed intervention is *"by a charitable or not-for-profit organisation which seeks to make submissions in the public interest"*. It is to be hoped that this power will be generously exercised. But it has rightly been pointed out that it would be so much better if there were no fee for a public interest intervener (Metcalfe §66).

6. What follows is an attempt to identify some principles, in the nature of ten suggested virtues, which the case-law and experience suggest ought to characterise effective public interest interventions in the UK Supreme Court.

(1) Proactivity

7. The worst position to be in for a prospective intervener is to have found out late in the day that an important hearing is coming up. By then, the parties are established, the issues agreed, and the timetable for the hearing allocation. Resistance is likely to come from them and from the Court for any intervention which will threaten sound case-management and the ability to prepare and pre-read. A common ground objecting to a proposed intervention is that it will upset the timetable. As has previously been the situation (Metcalfe §51, citing Fordham *Public Interest Intervention: a Practitioner's Perspective* [2007] PL 410):

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

8. Sometimes, the lack of time makes it simply impossible for an effective intervention to be launched. For example, in the linked cases of *K* and *Fornah*

[2006] UKHL 46 preparation time was so short that UNHCR decided to intervene only in *Fornah* (gender-based persecution) and not in *K* (family-based persecution). Since 2008 the HL rules required petitions for leave to intervene to be lodged 6 weeks before a hearing, a position now reflected in Practice Direction 6 at §6.9.3.

9. Access to information is key. The Supreme Court's website should make it much easier to monitor what cases are in the pipeline. But, if practicable, monitoring cases at Court of Appeal level is wise. Sometimes an intervener will participate at that level – perhaps in writing only – and with a view to then intervening at Supreme Court level should there be a further appeal. That is what JUSTICE did in the control order cases of *MB* [2006] EWCA Civ 1140, *JJ* [2007] QB 446 and *AF* [2008] EWCA Civ 1148. One important consequence of having intervened below is that the intervener then earns the right to be notified of an application to the Supreme Court for permission to appeal (SCR r.12(b)) and of any decision granting it (SCR r.15(4)(b)). A proactive NGO will look at the Court of Appeal's output at least, identifying important cases which may go to the Supreme Court. Whether or not they participated in the case in the Court below, the prospective intervener is entitled to lodge written submissions in support of an application for permission to appeal: SCR r.15(1).

(2) Orality

10. There is no getting away from it: an oral intervention can be far more valuable than one which is in writing only. It is also far more labour-intensive: preparing properly to try and add value to the parties' submissions in a short oral slot (often an hour or even half an hour) will often involve as much preparation as preparing to make submissions at a more leisurely pace as a primary party.

11. Naturally, a written-only intervention can be effective if the issues and the points which the intervener would want to make are well-crystallised. A written-only intervention may also be amply effective in ensuring that the Court gets the message loud and clear, that certain respected interveners support a line of analysis. In the *Al-Skeini* case [2007] UKHL 26 (extra-territorial application of human rights law) there was strong force in the mere

fact that the applicability of human rights law to the actions of British soldiers in occupied Iraq was supported by a united coalition including: the Redress Trust, the AIRE Centre, Amnesty International, the Association for the Prevention of Torture, the Bar Human Rights Committee, British Irish Rights Watch, Interights, JUSTICE, Kurdish Human Rights Project, the Law Society and Liberty.

12. Permission limited to written-only intervention is the norm in the European Court of Human Rights in Strasbourg, where the intervener may be restricted to ten pages. As can be well imagined, that is an approach which brings with it a strong temptation to use narrow margins and small fonts.

13. But a written intervention is easily overlooked, and can be buried among the papers, especially in a case where the principal parties are only interested (or able) to develop their own lines of argument. Moreover, no written intervention can anticipate what will be written in later documents submitted; nor what will be argued on the day; nor what materials will be shown to the Court; nor – and this is most important of all – what questions and comments will come from the Supreme Court Justices. Oral submissions can bring argument or materials to life; they can react, reinforce, reassure. That is, after all, why we have oral hearings.

14. The potency of oral interventions is, one suspects, also why they are resisted by those who feel threatened. It is the common position of Government departments to respond to an application to intervene by saying: yes (to appear cooperative) but written-only (to minimise the impact). It is a shame, for example, that written-only permission was granted to JUSTICE in *Corner House* [2008] UKHL 60 (discontinuance of anti-bribery investigation). Where granted, the opportunity to appear and make oral submissions is a very valuable thing, to be handed with care and responsibility.

15. At the advent of the Human Rights Act 1998 the Lord Chancellor told Parliament that he expected the Courts to be *"equally hospitable to oral interventions provided that they are brief"* (Metcalfe §36). Whether there is much, indeed anything, needed to be added or responded to, will only be known at the hearing. But by restricting an intervener to written-only submissions the Court is prospectively disempowering itself from ventilating that which later

emerges as its most troubling concern, to see whether there is anything that an intervener can suggest by way of assistance.

(3) Cooperation

16. Cooperation with the parties is essential. The practice has been that the House of Lords would not consider an application for permission to intervene until the views of the other parties had been sought and received (Metcalfe §33). This is now reflected in Practice Direction 6 at §6.9.2 which requires the consent or its refusal to be notified. There is good reason to insist that an intervener approach the parties, but the application ought surely not to be held up where a party has failed promptly to reply.

17. Cooperation does not involve any surrendering of independence. A fairly intricate balance may result, especially when one party is seeking to liaise with what it perceives to be a supportive intervener. As Metcalfe explains (§71), the intervener may be placed in an awkward position if one party wishes to liaise with it about the arguments to be presented:

> ***For it is also helpful for interveners to have information about how each party is running its case, so as to best assist the court and to maximise the effectiveness of the intervention. Just as it is not the purpose of an intervention to support a party's argument, it is also important not to undercut it inadvertently. For this reason, JUSTICE maintains a policy in third party interventions whereby it is happy to receive information from either party but will not discuss its submissions or otherwise coordinate its arguments with the parties.***

18. Cooperation between interveners is also important. There can be cases where more than one intervener can properly attend and make separate submissions. That is what happened in the control order cases of *MB* and *JJ*, where separate interventions were made and submissions advanced by Liberty (as to the deprivation of liberty) and JUSTICE (as to the deprivation of justice). But joint interventions are effective streamlining and make permission to intervene orally more likely than a long queue of separate intervening teams. A good example of a powerful and successful joint intervention was the Liberty/JUSTICE/JCWI intervention in *Ullah* [2004] 2 AC 323 on human rights risks from immigration removal, a topic revisited by JUSTICE and Human Rights Watch in their joint intervention in *RB (Algeria)* [2009] UKHL 10. A powerful but unsuccessful joint intervention was that of Amnesty, Interights, Redress and JUSTICE in *Jones* [2007] 1 AC 270 (torture

immunity). Of the 35 NGO interventions in the House of Lords between 2005 and 2009, 13 (37%) were joint interventions (Metcalfe n.42).

19. The intervener can expect to play a secondary role. There may be gaps to be filled. There may even be points left by the parties for the intervener. In the asset-freezing cases (*A v HM Treasury*), for example, the appellants advanced two points which they then said they would leave it to the intervening NGO to develop.

20. The dangers of acting as a principal party are reflected in the costs position. The strong norm is that costs orders are not made against (nor in favour of) interveners. This is reflected in SCR r.46(3), which continues however in this way: *"but such orders can be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent)"*. This costs problem was encountered by the United Synagogue in the *JFS* case (Jewish school admissions policy) [2009] EWCA Civ 681 at §4; and by the Secretary of State in *Barker* [2006] UKHL 52 (EU environmental law implementation) at §§32-33. By taking on a lead role, a costs liability was incurred. If there is an intervener's Oscar, it should always be for 'best actor in a supporting role'.

21. The costs threat can be a real impediment. A graphic illustration of this is given by Metcalfe (§72). He describes the chilling way in which the Government used the threat of an adverse costs order to lead to the withdrawal by Liberty from the intervention which it had permission to make in *S and Marper* [2004] UKHL 39 (on the use of a DNA database). The case was lost and had to be pursued in Strasbourg, where Liberty was able to intervene and the House of Lords decision was overturned.

(4) Freshness

22. By the time a case gets to the Supreme Court the parties are likely to have fairly entrenched positions. They have been through the judicial mill, twice. The issues argued and determined in the Courts below will be the backcloth for the appeal in the Supreme Court. The issues will be as agreed in the *Statements of Facts and Issues*. Only the most proactive of interveners will have had any potential for influence in any of that.

23. An intervention may be an opportunity for a breath of fresh air. The intervener should approach the litigation with an open mind; the intervention submissions should start with a blank screen. After all, the Justices of the Supreme Court will themselves test the assumptions, and raise ideas and thoughts and questions of their own. They will do their lateral thinking and make sure that they have seen the bigger picture. So should the intervener. It is not inappropriate to take steps to canvas an additional point or concern or answer, provided that this is done responsibly and proportionately. There is rightly no restriction in the Supreme Court as is found in the European Court of Justice at Luxembourg, whose Statute restricts interveners to *"supporting the form of order sought by one of the parties"* (Metcalfe §48).

24. The intervener will also need to prepare for the prospect that another party may produce a wholly new line of argument, falling within its own realm of special interest and expertise. That was the position in *Asfaw* [2008] UKHL 31 where the prosecution's main argument was a new point based on a restrictive interpretation of the Refugee Convention, and which needed to be met by the appellant and UNHCR intervening, by reference to citation of comparative refugee law.

25. The Court will be looking for value-added. It has been said by Judges (see Metcalfe §34) that interventions would only be allowed where they *"feel it necessary or helpful"* (*Re NIHRC* [2002] UKHL 25 at §25), where *"the interests of justice will be promoted by allowing the intervention"* by reference to *"whether the intervention will assist the Court"* (§32). Not that it could be right to require an intervener prospectively to prove that it will make a difference. The interests of justice may lie in hearing a further voice. And the potential to assist should suffice.

26. The intervener needs to find its own voice. That will be reflected in the substance, direction and tone of the intervention. It can be reflected in underlying evidence put before the Court. But it may also be reflected in the choice of personnel. A choice as to advocate can reflect the desire for distinctiveness, especially in areas involving academic expertise. Amnesty International instructed Professor Brownlie QC in *Pinochet*; Liberty and JUSTICE instructed Professor Crawford SC in *Al-Jedda* [2007] UKHL 58; UNHCR instructed Professor Goodwin-Gill in *ERRC*.

(5) Boldness

27. An intervener may be able to afford to take a brave, possibly even extreme, but principled position. This will be a calculated risk. Risk, because the point may bomb or be ignored or left open in the case at hand. Worse, it could damage the intervener's reputation with the Court and impair the judicial appetite for interventions in future. Calculated, because there is a chance that it may help. And, provided that it is sought to be handled with care, the intervener is in a position to take the rap for the bum point if it is so perceived. But Courts ought not to judge unduly harshly those who take positions which can be seen to reflect public interest considerations and to have been borne out of principle, even if they are seen as over-ambitious or incapable, on consideration, of being accepted or perhaps even entertained.

28. Some instances will prove undramatic. In *Fornah* [2006] UKHL 46, for example, UNHCR took an alternative, broader legal point than the one advanced by the appellant. That submission was then adopted and (*"Departing from the submission made below, but with the support of the UNHCR"*: see §31), the point was accepted. In *MB* [2007] UKHL 46, JUSTICE as intervener lodged early some written submissions, because it wished to interest the House of Lords in two possible new reinterpretations of the Prevention of Terrorism Act 2005: one, as to the 'reasonable suspicion' test; the second, as to the possibility of an implied fairness proviso. Each was then taken up, somewhat gingerly, by the appellants and featured at the hearing. Of the two, one was met with embarrassing incredulity and sank without trace. The other won the day. But they were equally ambitious and it would have been quite impossible to predict which one would fly.

(6) Perspective

29. The Court will be looking to see whether the Intervener can bring to the issues a different perspective, a broader or more specialised basis of knowledge, information and learning. This is a key part of the distinctiveness which an intervener's contribution can have. As Lord Hoffmann put it (*Re E* [2008] UKHL 66 at §2) an intervener's permission to intervene will often be *"in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain"*. As Metcalfe puts is (§56):

> ***… a grassroots organisation, for instance, is likely to be well-placed to gather evidence concerning the direct impact of proposed measures; a policy organisation may be better-placed to provide submissions on policy aims and legislative history, an organisation with international expertise may be able to assist with comparative law, and so forth.***

30. The Court is likely to be impressed if a line of analysis reflects consistent position statements which the intervener has itself promulgated. This is seen in the countless interventions over the years by JUSTICE on the issue of secret evidence and closed hearings, a topic on which it has published informed and damning reports. Such an intervention was made in the control order cases, but in key cases before that, including the parole case of *Roberts* [2005] 2 AC 738. Similarly, issues which are intimately linked with the international plane – such as the use of evidence obtained as a result of torture abroad – was the subject of a powerful joint intervention including the International Commission of Jurists, the International Bar Association and the Commonwealth Law Association: see *A (No.2)* [2006] 2 AC 221. Consistency on points of principle is also to be expected, as in the case of *YL* [2008] 1 AC 95, where the intervener NGOs (Liberty, JUSTICE and the British Institute of Human Rights) were adopting a position which previous interventions had followed in earlier relevant case-law.

31. The Court will respect an intervener whose submissions are *"properly directed to principle"*, even if thereby *"strongly supportive"* of a party's appeal (*Fornah* [2006] UKHL 46 at §9). Such has been the position of UNHCR, whose materials can be presented to the Court, with reinforcement and explanation, the Justices can feel that it is assisted by relevant insight and perspective. In cases like *Fornah* and *Asfaw* [2008] UKHL 31 assistance has been derived from UNHCR's Executive Committee conclusions, Expert Round Table conferences; and also from comparative refugee law collected and analysed for the hearing.

(7) Consequentialism

32. The advocates for an individual party before the Supreme Court will rightly be driven by the interests of their client which will, almost certainly, be focused exclusively on victory in the individual case in question. Some parties, especially Government, are in a different position. They are repeat-players. They are looking at the effect across the board. They may be trying to

put down (or encourage) markers designed to help in other cases and on other issues.

33. An intervener is likely to be in the position to assess and address the wider consequences of the arguments. They may provide a necessary counter-balance where a party is seeking to paint on a broader canvas. It can be the case that the consequences for other cases are far more important, looked at in the round, than the narrow result of the particular appeal. That may in truth be the reason for intervening. It is essential that it is all thought through.

34. Taking a practical example, in the asylum case of *Fornah* [2006] UKHL 46 a question arose in argument as to what the effect of the new EU Asylum Directive 2004/83/EC Art 10(d) of which appeared to provide that a "particular social group" would need both (a) an innate characteristic "and" (b) a distinct identity. This troubled the Court. But UNHCR's submissions were accepted: that these would need to be treated as alternatives, given the refugee jurisprudence and the primacy of the Refugee Convention (see Lord Bingham at §16). This point was an important one, but only in a broader context for other cases.

(8) Conciseness

35. By the time that the pre-reading Supreme Court justice gets to the intervener's written case they will have read a lot. The last thing they need is to have yet another introduction; yet another description of what they have already read. The document should be drafted to meet the informed reader and move them on. An unengaging document is one which the reader is likely to skip-read only. Best to start with a principled analysis that gives the answers. Then amplification can follow.

36. Brevity and tight-reasoning does not mean shallowness. The analysis can be concise and yet comprehensively referenced. The judgments of Lord Bingham, in many ways the template for domestic UK law, proved time and again how these virtues could be combined. Written arguments had been getting longer in House of Lords cases. That trend is unlikely to be popular with the Supreme Court. For an intervener, even introducing a new perspective and further materials, 20 pages seems a sensible guideline.

37. As for the time-slot which is given for oral submissions, the advocate should be ready to move at speed, giving references. If the Court is to be irritated (and better if not), much better that it be by the advocate going too fast, and so being asked to slow down. Going at speed is not about getting through the points by talking fast; but doing so with fewer words.

(9) Non-repetition

38. The guiding principle, albeit unseemingly barbed in its deployment against a particular intervention team in a particular case, was articulated as follows (*Re E* [2008] UKHL 66 at §3): *"An intervention is of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener … if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties … [nor] only repeat[] in more emphatic terms the points that ha[ve] already been quite adequately argued"*.

39. Broad shoulders and a thick skin may be necessary. The warning, in its fuller form in the law reports (and repeated in the Supreme Court's practice direction *Practice Direction 8 at §8.8.2*), involved a harsh and unseemly attack by Lord Hoffmann on a particular intervention team. The principle Lord Hoffmann was expressing is an important one. "Non-repetition" should be written in felt-tip on every advocate's pencil case.

40. But the intervener is not always in an easy position when it comes to applying it. There is nothing wrong with an intervener venturing onto the same ground, to make submissions of their own in order to seek to assist the Court. An authority may have been missed, or even a key passage from an authority which has been cited; a point may require a fuller or different explanation; a follow-up point may be worth making; a question may deserve a fuller answer; a point may benefit from being looked at in a different way. An intervener, speedily and concisely using their modest time-slot, on the basis of a professional judgment intended to assist the Court, should not be deterred nor condemned. The intervener should not be discouraged from returning to walk in the garden, if there is a different path to be taken, or if there are other flowers worth examining along the way.

(10) Returnability

41. An intervener should always remember the next time. Maybe they are a possible repeat-player. Even if not, there are other intervening organisations waiting their chance.

42. The Court will expect the common courtesy that, where an intervener has been given permission to make oral submissions, *"all counsel instructed on behalf of [the] intervener … should attend the hearing unless specifically excused"*, an expectation which is now a requirement (Practice Direction 6 at §6.9..4).

43. More generally, the Court needs to know whether it can trust interventions to be responsibly handled. Were relevant points made, and materials shown? Is the time-frame adhered to? Was it all a try-on, and exercise in show-boating, or did it actually help? Were submissions mere repetition of what the parties had adequately argued? Destroy their faith in interventions and you burn boats for the next interveners in the next cases. So be on your best behaviour. Next time around, the Justices will again be considering whether to give permission to intervene; whether an intervention may it be *"helpful"*; may it mean that *"the interests of justice will be promoted"*; may it *"assist the Court"*. The Justices may not be able to predict. But they will be likely to remember.

44. In other words, what the intervener really wants, if at all possible, is to leave the Supreme Court thinking that: (a) interventions are really rather a good thing; and (b) they wouldn't necessarily mind having you back another time.

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