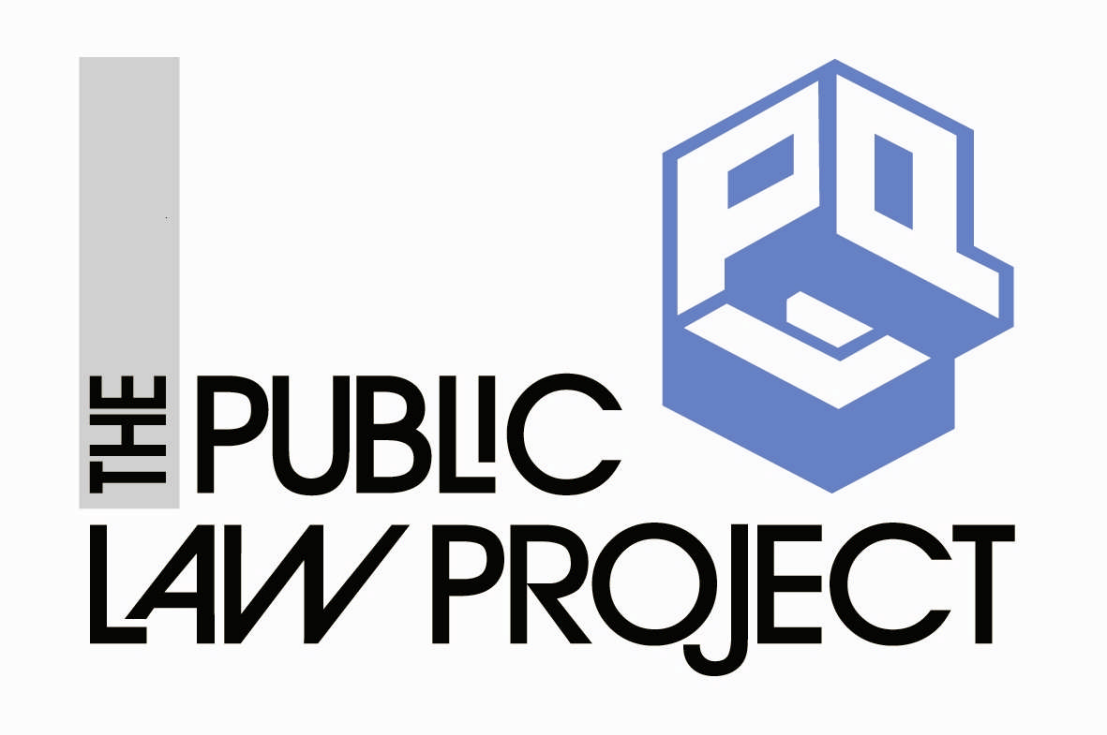

Third Party Interventions

- a practical guide

This has been produced by the Public law Project in order to assist anyone considering whether to intervene in proceedings before the Administrative Court or Court of Appeal. It is primarily aimed at organisations.

Contents

We are grateful to: Lynne Knapman, (Deputy Master of the Crown Office and Deputy Registrar of Criminal Appeals) , Henry Brooke, (Former Vice-President of the Court of Appeal), Henni Ouahes, Simon Slidders, (lawyers at the Court of Appeal and Administrative Court respectively), Richard Stein, (Leigh Day & Co), John Halford, (Bindman & Partners), Phil Michaels, (Friends of the Earth), and James Welch, (Liberty).

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Part 1 Introduction

Claims for judicial review often raise issues of public significance that go beyond the interests of the parties involved. Many of these cases affect disadvantaged or vulnerable groups whose interests are represented by voluntary sector organisations. Because of their specialist knowledge about how particular decisions impact upon the group they represent, these organisations have the ability to make informed submissions that could assist the court. Third party interventions are a method by which a person or organisation not otherwise involved in the litigation may submit specialist information or expertise to the court. A third party intervention therefore offers a route by which such organisations may make an effective contribution to the court's decision-making process. In the words of Lord Slynn:[1]

> "… Whether as amicus curiae, keeping within the limits of a non-partisan view of the particular case, or advocating as intervener where there is a danger that an important principle of law favouring one party or the other has not been brought to the attention of the court, the [Commission] would have the possibility of promoting understanding by the courts of human rights law. Courts can gain much from such interventions …

Traditionally, there have been three main barriers preventing the use of third party interventions: firstly, organisations may be unaware of pending judicial review claims raising issues of interest to them; secondly, because the practice is not well developed, they may not know how to make an intervention; and lastly, they may fear being ordered to pay substantial legal costs to the other parties as a result of their intervention.

Unfortunately there is no publicly accessible register of pending judicial review claims, but it is hoped that through this guide (kindly funded by the Nuffield Foundation) we will go some way in addressing the second and third of these concerns, and build upon our earlier research on Third Party Interventions[2]. If the advice contained in this guide is followed, we believe that the risk of the court making a costs order against you – which is not as great as many imagine - will be minimised.

Organisations that employ legal advisers are welcome to make use of PLP's own solicitors for information on the mechanics of what may be an unfamiliar procedure. For those without their own in-house legal expertise, PLP can provide information and assistance. In some cases we *may* be able to act for you, (i.e. helping you prepare submissions, instruct a barrister and liaising with others including the court on your behalf), but this cannot be guaranteed.

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[1] Re Northern Ireland Human Rights Commission (Northern Ireland) [2002] UKHL 25

[2] Third Party Interventions in Judicial Review: An Action Research Project (2001), also funded by the Nuffield Foundation. The report is available to download from the Project's website (www.publiclawproject.org.uk).

Finally, the information and suggestions that follow are based upon what has been learned from previous third party interventions by PLP, from other public interest groups and their solicitors, and the courts themselves.

Part 2 – Some basic principles

Ways of intervening

Administrative Court

Judicial review claims commence in the Administrative Court, and other parties, in addition to the claimant and defendant, may become involved in the proceedings in four different ways.

1. Becoming a party to the proceedings

This process is not an intervention as such, but rather one where a person or organisation is invited to become a party because they are directly affected[3] by the subject matter of the proceedings, and so affected without 'the intervention of an intermediate agency[4]. They are then known as 'interested parties' (IPs). Where a claimant knows of such a person or organisation, he becomes obliged to serve his claim form on them unless the court directs otherwise[5]. For example, in planning cases, the defendant is usually the planning authority, but those benefiting from the grant of any planning permission should be served as IPs. Similarly, challenges by parents to decisions of School Admission Appeals Panels should also be served on the local education authority.

IPs then have the choice as to whether they wish to become parties to the proceedings and have the opportunity to participate in the normal way – to file an acknowledgement of service,[6] detailed grounds for contesting the claim,[7] and, with the court's permission, to be heard at any permission hearing[8] or at the full hearing itself[9]. Similarly, the IP would be required to be party to any consent order disposing of the case, and is able to seek leave to appeal.

The costs position for IPs is less straightforward, but the general rule is that an unsuccessful claimant will only be liable for one set of costs, with an order in favour of an IP being made only in exceptional circumstances, (because, for example, the participation of the IP was essential to the resolution of the case – 'Hamlet without the Prince'[10]). Equally, a costs order made against an IP is also rare, (although IPs may wish to consider whether they should seek a Protective Costs Order, see Part 3 of this guide)

We do not deal with this type of situation here, given that it is akin in all material respects to being an actual party to the proceedings, rather than an intervenor.

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[3] CPR Part 54, rule 54.1(f)

[4] *R v Rent Officer Service ex parte Muldoon* [1996] 1 WLR 1103

[5] CPR Part 54, rule 54.7.

[6] CPR Part 54, rule 54.8.

[7] CPR Part 54, rule 54.14.

[8] Practice Direction 54, issued August 2000, para 8.5.

[9] CPR Part 54, rule 54.17.

[10] *R (Smeaton on behalf of SPUC) v Secretary of State for Health* [2002] EWHC 886 Admin

2. Providing Impact Evidence

A person or organisation may provide expert evidence through one of the existing parties to the action, by invitation or arrangement. The evidence is usually provided through a witness statement, which is then served on the other parties and on the court. This evidence can then illustrate the impact of a particular state of affairs upon the author of the statement, or upon the group the author's organisation has knowledge of.

Example:
Regina v the Lord Chancellor, ex parte Witham [1997] 2 All ER 779
This case concerned the removal of exemption or remission of court fees. It was challenged on the ground that persons on low incomes were effectively denied access to the courts in proceedings where legal aid is unavailable.

The Public Law Project, whose aim is to improve access to public law remedies for disadvantaged groups, provided evidence by way of an affidavit (witness statement) in support of the claimant. This gave examples of various categories of case where individuals on low incomes had been prevented from going to court, often with potentially serious consequences. The Divisional Court held that the removal of the exemption or remission infringed the constitutional right of access to the courts by barring poorer people. In giving judgment, Laws J referred to PLP's evidence of the wide-ranging impact of the increased fees. By bringing this issue before the court, PLP had therefore assisted and influenced its decision.

The provider of the evidence does not therefore become a party to the proceedings and the costs risk is very low.

3. Direct Intervention

On the other hand, you may wish to take a more independent role in the proceedings by making written and/or oral submissions.

The court has the power to be able to receive evidence and hear from any third party in the course of judicial review proceedings, [11] and grants such third parties permission to participate because their expert evidence can assist the court. Such interventions are becoming increasingly common,[12] particularly in public interest cases.

This class of intervener is not however a party to the proceedings. It can neither be party to any consent orders within the proceedings and is similarly unable to seek leave to appeal. However, they are subject to greater flexibility (as compared to method 1, above), when it comes to the issue of costs.

[11] CPR Part 54, rule 54.17.
[12] See Smith, Ashton and Bridges, Third Party Interventions in Judicial Review: An Action Research Study, Public Law Project, May 2001.

Example:
R(Corner House Research) v Secretary of State for Trade & Industry [2005] 1 WLR 2600
The claimant in this case was seeking an order from the court to protect itself from any cost liabilities in the event that it lost the case, (a Protective Costs Order). It argued that the case was being brought in the public interest, and the threat of an adverse costs order would prevent it from taking any further steps in the litigation. PLP sought permission to intervene on the basis that it could assist the court by setting out relevant jurisprudence in relation to such orders both domestically and in different jurisdictions, and had knowledge and expertise in public interest litigation.

4. Direct Judicial Invitation
Finally, in a relatively new development, the Court may seek out parties of its own motion, when it considers that it requires additional evidence to that already placed before it by the parties themselves[13].

It is difficult to conceive of circumstances where any such party would subsequently be penalized in costs, so long as its involvement remains within the scope of the court's invitation.

Example:
Rogers v Merthyr Tydfil CBC [2006] EWCA Civ 1134
This was a case concerned with the level of 'After The Event' insurance premiums in small civil claims. The Court of Appeal asked if liability insurers would be interested in intervening in the case and in the event several made helpful written submissions. 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.

Court of Appeal
Judicial review appeals are heard by the Court of Appeal, and it will normally hear from all the parties that were involved in the Administrative Court, and it may also hear from a party becoming involved for the first time. In the latter case, the methods of intervening are similar to those described above.

House of Lords
Their Lordships hear cases on appeal from the Court of Appeal, and they too may hear from all the parties involved in the earlier proceedings, and can give permission for a party to intervene for the first time.

Who can intervene?
Third party interventions have the advantage of enabling more objective information and neutral argument to be presented. The third party intervener might want to present themselves as an expert, there to assist the court itself rather one of the other

[13] *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134??

parties. Interveners of this kind are known as *Amicus curiae* in the US, a Latin phrase literally translated as "friend of the court".

Although there is no specific requirement that those wishing to intervene in judicial review cases must fulfill, the court is more likely to allow an intervention if an organization can claim a special remit and / or has something to offer beyond that which the parties will provide. Occasionally interventions are permitted on the specific condition that the parties' submissions are not duplicated.

It may do so because it represents the interests of particular groups who may be affected by the case, or it has access to information, expertise or a perspective that cannot be provided by the other parties, and that will assist the court's understanding of the wider impact that the case might have.

Information about relevant cases

There is currently no publicly accessible register of pending judicial review cases in the Administrative Court. There are formal and informal networks of both lawyer and non-lawyer organizations which bring cases in particular fields, or who might know of cases being brought by others. Judgments of the Administrative Court will however be publicly available, either in law reports or on Casetrack[14]. The transcripts usually contain any post-judgment discussion including requests for leave to appeal on public interest grounds.

A computer print-out of pending cases in the Court of Appeal is kept in the Registry of the Civil Appeals Office, and may be consulted by any member of the public. Only the name of the original claimant for judicial review and the case number are provided, and no reference to the stage the case has reached in proceedings is given.

Is a particular case likely to settle?

Many judicial reviews are settled out-of-court, often because the public body concedes the case. This can prevent issues of more general public interest being raised and undermine the efforts of third party interveners. Some cases will also settle because judgment has been given in another case involving the same issues. Early contact with the claimant and/or their representatives is essential, and will provide you with information as to whether a settlement is likely.

[14] This is the website of court reporters Smith Bernal

Part 3 Tactics, procedure and costs in third party interventions

What are your aims and objectives?
Be clear about what you wish to achieve. Think carefully about what you want to say about an issue that has not already been said by another party. Early discussion with the actual parties to the proceedings is essential. You may wish to provide evidence in support of one party by the submission of a witness statement, or you may wish to seek permission to intervene in your own right.

The need for permission
Any potential intervener wishing to intervene in their own right, must apply to the court where the proceedings are taking place for permission to intervene as an independent third party. The Civil Procedure Rules, ('CPRs') regulate the procedure and provide that anyone may ask the court's permission to intervene either in support of or in opposition to a claim for judicial review in the Administrative Court[15] or in an appeal before the Court of Appeal[16]. In the House of Lords[17] third parties may apply for permission to intervene by petition. It is always worth bearing in mind the following comments of Lord Woolf[18]:

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

There is currently no set procedure or format for making an application to intervene, (save that it be prompt), and it is hoped that guidelines for applying for permission to intervene will be provided in the near future. In the meantime, a suggested procedure for doing so is set out below, with guidance as to format set out at page 16 of this guide.

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[15] CPR Rule 54.17

[16] CPR Rule 52.11 but see also page 12 on applications to the Court of Appeal by letter.

[17] Direction 34, Practice Directions and Standing Orders: Applicable to Civil Appeals (January 1996)

[18] *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25

First steps – contacting the other parties

Before applying to the court for permission to intervene, it is essential to contact the other parties in the case in order to ascertain whether they would support or resist the application. The details of the parties will be available from the court documents themselves. We suggest that any letter to them follows the same format as the substantive application for permission (see page 16). It is advisable also to seek an undertaking from the other parties that they will not seek any costs against you, offering a reciprocal arrangement.

Any application for permission that is made without the other parties having being contacted first is likely to be refused. Where time is short[19], it is suggested that the other parties are contacted by telephone and that the application to the court is copied to them, with an invitation to comment. Always remember that the other parties have 'ownership' of the case and the duties of the parties respective legal advisers are to the court and to their clients, not to you. They may well not share your campaign objectives and may simply wish for the case to be run and won on their own terms. Therefore effective communication is essential. It is common for parties to indicate that they have no view on your application to intervene other than the impact on the length of the hearing and that they consider it to be a matter for the court to come to a view on.

It is good practice to have regard to the following, (and it will also lower the risk of the other parties attempting to seek the costs occasioned by your intervention):

1. Act promptly

Promptness is the only explicit requirement in the rules. Application to intervene made very late in the day are unlikely to face a warm reception because the parties and the Court will generally have agreed what the issues are and how much time is needed to argue about them. An intervention at this point will almost inevitably cut into preparation or court time one or more of the parties has been relying on having.

2. Communicate with and be aware of the needs of the parties

Tell them who you are, why you wish to intervene, and what you wish to say. The other parties will know that the more value you add to the proceedings (and the less you take up time unnecessarily, for example by duplicating what others will say), the more the court will be disposed in your favour, both in terms of granting you permission to intervene and/or in the event that no agreement on costs can be reached. You should also try to interfere as little as possible with the timetable leading up to and including the hearing itself.

[19] Any application to intervene should be made as early as is practical since permission may be refused on the grounds of delay *(R v Secretary of State for Social Services ex p. Association of Pharmaceutical Importers* (1987) Unreported)

3. Be mindful of your profile in the proceedings

You are at least risk of costs when filing short witness statements in support of one party and at the most risk where you seek to submit voluminous amounts of paperwork and insist upon being able to make oral submissions at the hearing. You must try and narrow the scope of your intervention, submitting only evidence which is truly relevant. Ask to make oral submissions only if this will truly assist the court.

4. Observe the rules and requirements of the court

This means being aware of and conforming to the relevant Civil Procedure Rules and Practice Directions, and it also means liaising effectively with the court staff. Both the Administrative Court Office and the Civil Appeals Office have lawyers that monitor cases and brief judges. The lawyer responsible for the case can be contacted direct. They are generally helpful and will provide you with further procedural advice.

Refusals to consent by the other parties are not uncommon, and such responses should be carefully considered. It may be that you have not set out clearly enough the expertise of your organization, or the added value your presence will bring. If there is time to reply, then that opportunity should be taken and further correspondence entered into with that party.

The court must be made aware of all relevant correspondence, and copies should accompany any application for permission that is made to the court. This correspondence should also be copied to all the other parties to the claim.

Applications to the Administrative Court

Rule 54.17:-

Court's powers to hear any person

54.17 (1) Any person may apply for permission –

(a) to file evidence; or

(b) make representations at the hearing of the judicial review.

(2) An application under paragraph (1) should be made promptly.

Practice Direction to Rule 54:-

RULE 54.17 – COURT'S POWERS TO HEAR ANY PERSON

13.1 Where all the parties consent, the court may deal with an application under rule 54.17 without a hearing.

13.2 Where the court gives permission for a person to file evidence or make representations at the hearing of the claim for judicial review, it may do so on conditions and may give case management directions.

13.3 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.

13.4 If the applicant is seeking a prospective order as to costs, the letter should say what kind of order and on what grounds.

13.5 Applications to intervene must be made at the earliest reasonable opportunity, since it will usually be essential not to delay the hearing.

Applications to intervene in proceedings before the Administrative Court are required to be made by letter to the Administrative Court Office. There is no prescribed form or standard letter. There is also no fee.

Your letter should be clearly marked as an 'application under CPR 54.17' in order to prevent any risk that it is assigned to general correspondence. The letter should be posted or hand delivered (applications by fax do not necessarily get dealt with quicker simply because they are made by fax, and email is not currently a realistic option).

The correspondence is then linked to the court file and sent to a judge for a decision. This may be the lead judge (currently Collins J), or if the matter is at the pre-permission stage, it is joined with case papers and sent to the judge dealing with permission applications. If the case is as yet unallocated, then the lead judge decides.

Applications to the Court of Appeal

Where a party has intervened already in the proceedings before the Administrative Court, they are not normally required to make any further application in order to intervene in the proceedings before the Court of Appeal (unless required to do so on account of an earlier order made by the Administrative Court). This is because the Intervener is usually treated as if it were a respondent in the appeal, and no further action need be taken in respect of the mechanics of intervention. The remainder of this section therefore deals with the situation where permission of the Court of Appeal is required.

In contrast to the position within the Administrative Court, there are no Civil Procedure Rules expressly dealing with interventions in the Court of Appeal.

However, the Civil Appeals Office has indicated that applicants for permission should normally make a formal application[20] using a Part 23 application notice. This means the completion of Practice Form N244[21], and the payment of a prescribed fee (at present £200). 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.

PD 52 paragraph 11 - APPLICATIONS

11.1 Where a party to an appeal makes an application whether in an appeal notice or by Part 23 application notice, the provisions of Part 23 will apply.

11.2 The applicant must file the following documents with the notice
(1) one additional copy of the application notice for the appeal court and one copy for each of the respondents;
(2) where applicable a sealed copy of the order which is the subject of the main appeal;
(3) a bundle of documents in support which should include:
(a) the Part 23 application notice; and
(b) any witness statements and affidavits filed in support of the application notice.

The requirement to make a formal application in this way is a slightly controversial view, as one reading of the rules would indicate that the Part 23 application procedure applies only to those who are already parties to an appeal, and not to those that are seeking permission to become interveners, (Form N244 refers only to the parties and their solicitors and requires documentation that only the parties are likely to have[22]). However, the view of the Civil Appeals Office is that interveners should be treated in the same way as any parties or prospective parties to proceedings before the Court of Appeal, and should therefore make a formal application using Form N244.

Nevertheless, applications by letter are still being made in the same way as to the Administrative Court, (particularly where time is short), and are being accepted. In cases of doubt, we suggest that a party wishing to intervene for the first time in proceedings before the Court of Appeal should contact the Civil Appeals Office for advice as to whether to follow the formal route or the informal route.

Be aware of the cost implications

The position on costs is not entirely clear at present.

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[20] Under paragraph 11 of the Practice Direction to CPR Part 52.
[21] This form can be downloaded at: www.hmcourts-service.gov.uk/courtfinder/forms/n244_0400.pdf
[22] 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.

On the one hand, it seems clear that interveners will normally have to bear their own costs of making the intervention, as it is highly unlikely that the other parties to the proceedings will agree to pay the interveners costs. It is equally unlikely that the court would order them to do so. This is not normally problematic as public interest groups may already have contacts willing to provide legal advice and/or representation without charge.

One the other hand, the question of whether the intervener might be ordered to pay the other parties' additional costs caused by the intervention cannot be answered with a similar degree of certainty. What follows is general advice aimed at trying to minimize that risk for you.

Always bear in mind that it is possible to reach an agreement with the other parties usually that you will not seek costs against them and that they will not seek costs against you, and this should always be your first port of call. In the absence of any such agreement, it may be necessary to obtain an order from the court itself protecting the intervener from any cost liability. This is a form of Protective Costs Order, or PCO (where the court limits a party's costs exposure to costs early on in the case, rather than waiting to the end as usually happens).

Protective Costs Orders

In recent years, the courts have occasionally been prepared to exercise their powers to make PCOs in favour of claimants, but the circumstances in which they have done so have been fairly restrictive[23]. Such an order may impose a ceiling on a party's potential liability[24], or may even remove it altogether[25].

However, it is noteworthy that all of the cases on PCOs have dealt with the situation where it is the claimant, and not an intervener, that is seeking cost protection. Certainly, permission to intervene has sometimes been made conditional upon paying the other parties' costs, but in such cases the interveners also appeared to have a private interest in the decision[26] and the situation is likely to be different where the intervention is solely in the public interest. It is more common for permission to intervene to be based on there being no costs liability between the intervenor and other parties. Certainly, PLP's impression is that the threshold for an intervener's application for costs protection is a lower one than for a claimant. This

[23] *R v The Lord Chancellor ex p. CPAG* [1999] 1 WLR 347 and see also *R (Corner House Research) v Secretary of State for Trade & Industry* (Public Law Project interested party) [2005] EWCA Civ 192

[24] *R v The Prime Minister ex p CND* [2002] EWHC 2712 (Admin). See also *The Queen on the Application of Compton v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 - the court is entitled to (and will) take into account the ability of an applicant for a PCO to raise funds, and whether others can support the action.

[25] *R (Corner House Research) v Secretary of State for Trade & Industry (Public Law Project interested party)* [2005] EWCA Civ 192

[26] For example, *R v Central Criminal Court ex p. Francis and Francis* [1989] 1 AC 346

must be right, as the Intervener's motives are generally more about assisting the court in the public interest, than about pursuing its own private interest.

PLP has tended to make the application for cost protection at the beginning of the substantive application for permission, where it can be seen in the context of the nature of PLP, (a charity), it's interest in the subject matter of the proceedings, the value it believes it can bring, and the fact that it cannot realistically intervene if it is to face a risk of costs being awarded against it.

There are many examples of orders being made protecting interveners from having pay other parties costs which may be worth drawing to the Court's attention when making a similar application. Three cases are cited below:

1. in *R (Countryside Alliance) v. Attorney General* [2005] EWHC 1677 (Admin) [2006] UKHRR 73 at [28] the RSPCA was permitted to intervene on terms that no order for costs would be made against it (or in its favour).;

2. in *R (Elias) v. Secretary of State for Defence* [2005] EWHC 1135, the Commission for Racial Equality was permitted to intervene on essentially the same basis; and

3. in *R (Eisai) Ltd v National Institute for Health and Clinical Excellence* [2007] EWHC 1941 the Alzheimer's Society was given permission to intervene on the same basis and the trial judge went a little further, expressing the hope that any involvement by the Society in the appeal would be permitted by the parties on a consensual basis.

For cases within the Administrative Court, the rules state that 'if the applicant is seeking a prospective order as to costs' he should 'say what kind of order and on what grounds'[27]. There are no equivalent provisions in the Court of Appeal, but it may be safely assumed that the information required will be the same.

[27] CPR 54.17

Part 4 Content of a third party intervention

Applications should be succinct, and should follow the general format set out below. Remember that you have a duty of candour to the court and must therefore reveal all facts, (good or bad) that are relevant to your input into the case[28]. In addition, you will only end up irritating the court (or worse) if your application shows a lack of clarity as to the 'added value' that you say you can bring.

Who are you?
Provide a description of your organisation, including its public policy aims, activities, membership and/or people it represents. You need to show what value you are able to add to the proceedings, and so you should also provide an outline of your specialist knowledge or expertise relevant to the issues raised. It is most important to formulate your reason for being allowed to intervene in terms of what you can contribute to helping the court with its deliberations rather than because you think you should be given an opportunity to set out your position in the case!

In cases where you are seeking permission to intervene in the Court of Appeal, you should also give reasons for your failure to intervene in the Administrative Court (or to explain why you felt intervention at that stage was not appropriate but is now being sought on the appeal)[29].

What is the scope of your intervention?
Set out a statement of the public interest issues raised by the case, their impact upon the public generally or sectors of it, and the arguments you wish to address.

It is extremely helpful if these submissions could be cross referenced to the information within the claim form and documents (and if possible the skeleton arguments), as this does assist the judge allowing for ease of reading.

What order are you seeking to accommodate your intervention?
The more information you can give the better, as it enables the proceedings to become more structured, helping the court and other parties. The scope of the order you request should cover the permission to intervene, whether you wish to make oral submissions or whether you are limiting yourself to written submissions only, and dealing with the issue of costs. You should also indicate the probable length of your written/oral submissions, whether your oral submissions are limited to a reply only or whether you wish to address the court in more detail.

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[28] The Administrative Court Office has had cause to remind potential interveners that the purpose of an intervention was to assist the court, and not to continue a spat with the Treasury Solicitors!

[29] 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.

Permission to make oral submissions is only likely to be granted in the more important cases. A judge may also order that the decision whether to hear representations from you should be left to the court on the day.

Part 5 Precedent letter

The following text is taken from an application made by PLP to intervene in proceedings before the Court of Appeal. The structure can be adapted and used for applications in the Administrative Court.

Dear Sir/Madam

R (XXXX) –V- (1) AIT, (2) SSHD
CA No. 2006/1234 - Application for permission to intervene

1. The Public Law Project [hereafter "PLP"] seeks the permission[30] of the Court to intervene in the above proceedings, which are listed to be heard by the Court of Appeal on 10 July 2007. The nature of the interest of PLP in the proceedings and the scope of the proposed intervention are set out below.

2. PLP seeks permission to intervene by way of written submissions. In order to assist in the preparation of its submissions, PLP has instructed counsel, namely Rabinder Singh QC of Matrix Chambers and Duran Seddon of Garden Court Chambers, both of whom have agreed to act *pro bono*.[31]

3. Plainly PLP would not seek any order as to costs and it is not anticipated that any order for costs would be sought against it. Accordingly, the intervention should have minimal effect upon the length of the proceedings and no effect upon the orders made for costs.

4. This is not a case in which there were substantive proceedings in the Court below. The claimant conceded that he could not succeed in the Administrative Court and subsequently the Court of Appeal granted permission to appeal in order to determine the 'test' issue for itself. This is therefore the first point in

[30] The method of this application, namely by letter, is one of the three alternative methods used for seeking permission to intervene in proceedings before the Court of Appeal referred to in the paper 'Interventions in the Court of Appeal' delivered on 26 November 2006 by Sir Henry Brooke at the Institute of Advanced Legal Studies in a series of events organized by PLP and Queen Mary's College, London University. Given that, subject to this matter being re-listed, the application is for intervention by way of the presentation of written submissions only (rather than oral submissions assisted by a skeleton argument), this method would appear to be the most appropriate.

[31] Those representing the claimant F have confirmed that short oral submissions from PLP may assist the court and should be able to be accommodated within the existing time estimate. However, as the matter has been directed to be heard on a date when counsel for PLP cannot appear because of existing professional commitments, PLP is content to offer written submissions. PLP reserves the right to seek permission to make oral submissions should the case fall to be relisted.

these proceedings in which it has become appropriate to consider the question of an intervention.

PLP's interest in the proceedings

What is PLP?

5. PLP is a national legal charity[32] founded in 1990, whose central aim is to improve access to public law remedies for those whose access to justice is restricted by poverty, or some other form of disadvantage. Within this remit, PLP has three main objectives: (1) increasing the accountability of public decision-makers; (2) enhancing the quality of public decision-making; and (3) improving access to justice.

6. PLP's work combines legal advice, casework, training, policy and research activities across the range of public law remedies.[33] Research projects carried out by PLP have focussed on both the judicial review process and various aspects of alternative dispute resolution, and were often conducted in collaboration with academics specialising in public law at various universities. PLP's work has, over the years, played a part in the formation of government policy and legal reform. For example:

   (1) Completed research projects include *Third Party Interventions in Judicial Review: An Action Research Project'* (2001) and *The Impact of the Human Rights Act 1998 on Judicial Review* (2003). The former was followed by the insertion of CPR Rule 54.17, which sets out the procedure for third party interventions in the Administrative Court.

   (2) In 1995 we published *Judicial Review in perspective: Investigation of the trends in the use and operation of the Judicial Review procedure in England and Wales,* and we are currently involved in a follow up project, entitled *The Permission Stage in Judicial Review* (2005-2007) (see further below). We have also just started a new study which will consider what role there might be for mediation within, or as an alternative to, judicial review.

   (3) PLP was granted permission to intervene in *R (Corner House) v Trade and Industry Secretary [2005]* EWCA Civ 192 in relation to Protective Costs Orders, and was a member of the subsequent Working Group on 'Facilitating Public Interest Litigation' chaired by Maurice Kay LJ (see 'Litigating the Public Interest' published by Liberty in July 2006).

   (4) The coming into force of the Access to Justice Act 1999 meant that solicitors and not for profit agencies could only provide publicly funded legal services if they had a contract to do so with the Legal

[32] Registered charity number 1003342

[33] For further details, see www.publiclawproject.org.uk

Services Commission in the requisite area of law. PLP proposed that public law should be a recognised and discrete category of law alongside others such as housing and employment. Following extensive campaigning, this proposal was accepted by the Commission.

7. The casework that is carried out at PLP is mainly related to judicial review. PLP's solicitors take cases on referral from solicitors and advisers, or occasionally through other organisations and charities such as Age Concern. The cases in which PLP is involved are often considered to be 'test' cases. PLP also provides a specialist support service to lawyers and advisers and regularly publishes advice sheets and guides on commonly arising public law issues.

The nature of PLP's interest

8. The present proceedings concern the question of whether the effect of 'statutory review' by the High Court, of decisions of the unified Asylum and Immigration Tribunal ["AIT"] under the Asylum and Immigration (Treatment of Claimants etc) Act 2004, is to displace the ability of an applicant to apply for judicial review of the AIT's decisions. In *R (G) –v- IAT* [2004] EWCA Civ 1731, [2005] 1 WLR 1445, which was decided under the previous provisions of the Nationality, Immigration and Asylum Act 2002, the Court of Appeal effectively concluded that this was indeed the effect of the then new 'statutory review' remedy.

9. On the face of it, the remedy of statutory review has very clear procedural shortcomings as compared with judicial review. Under the system for statutory review:

   (1) consideration is given to the application on the basis of written submissions only and there is no opportunity to canvass the issues at an oral hearing of the application;

   (2) the decision made by the judge on the papers is final – there is no right of appeal to the Court of Appeal;

   (3) the review process itself does not require the Secretary of State to respond (as an interested party) to the application, thus reducing the likelihood of a review of the case by the Secretary of State in the face of legal argument. This is a significant aspect of the judicial review procedure.[34]

[34] CPR 54.8 requires that any person served with a claim form in judicial review proceedings is to file an 'Acknowledgment of Service' within 21 days of service of the claim, which must set out whether the defendant or interested party intends to contest the claim and, if so, it must provide a summary of the grounds for doing so. One of the purposes of this requirement, as underlined in *R (Mount Cook Land Ltd) –v- Westminster City Council* [2003]

10. PLP's remit (as described above) is to seek to *improve* access to public law remedies. It is naturally gravely concerned about the effective replacement of judicial review with a far inferior remedy in an area of decision-making covering fundamental rights where, historically, the judicial review process has delivered a very substantial impact.[35] The features of judicial review which distinguish it by its effectiveness as a remedy, form one of the key issues in these proceedings which PLP would seek to address.

11. Another key issue in the case relates to discrimination in access to public law remedies. Those who may require access to the AIT in the first place (and thereafter to review of its decisions) are those who may require leave to enter or remain under the Immigration Act 1971, or who are seeking to vindicate their rights to free movement under EU law. They are almost always defined by their foreign nationality. One of PLP's stated case-working priorities is in combating discrimination[36], and plainly discrimination in even *accessing* public law remedies is of prime concern to PLP.

General scope of the proposed intervention

12. Without seeking to 'strait-jacket' the written submissions that PLP would seek to advance, the following areas are those upon which the proposed intervention would focus.

Set out the focus of your submissions

Conclusions

26. In conclusion, PLP has a clear interest in these proceedings. PLP is a reputable and unique legal charity which provides research, training, case-work, publications and specialist support exclusively in order to promote, develop, reform and ensure access to public law remedies, central to which is judicial review. The form and nature of the proposed intervention will have no effect upon the costs of the litigation and negligible effect upon the length of the proceedings in Court.

EWCA Civ 1346, [2004] 2 P & CR 405, is to encourage defendants to give early consideration to the issues and , if appropriate, to respond in accordance with their responsibilities.

[35] See, for example, the conclusions of Richard Thomas in his very informative article on the role that judicial review has played over the past few decades in the development of the protection of rights to asylum, *The Impact of Judicial Review on Asylum* [2003] PL 479 at 509-10: "In view of the importance that each claim be considered individually on its merits, the courts' role in prompting the establishment of the appeal system and in overseeing its operation arguably represents the most significant impact of judicial review."

[36] PLP's casework priorities are set out in the section of the website (www.publiclawproject.org.uk) entitled 'Current casework priorities', one of which is listed as 'Discrimination, including EU law, Article 14 ECHR, race equality, sex discrimination, disability discrimination etc'.

27. It is hoped that the submissions of PLP can assist the Court in arriving at its conclusions in a case of great significance for access to justice and for the protection of the fundamental rights of a vulnerable section of the community.

28. For all of the above reasons, PLP respectfully seeks the permission of the Court to intervene in this case. A copy of this letter is being sent to the Treasury Solicitor and the Refugee Legal Centre to seek their views on the application contained in this letter.

Yours faithfully

Conrad Haley
Director, Public Law Project

Copies to (1) the Treasury Solicitor; and (2) RLC; and (3) AIT