The Importance of Third Party Interventions in Public Law and Human Rights Cases

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Good afternoon. It really is a pleasure to be here. When I was asked it took me about one second to say yes. I consider I am kind of half Irish because I married an Irish doctor. We met here in Dublin and we ended up having a small house up the road in Stoneybatter and I have had quite a few liquid lunches in this hotel. It really is a very interesting exercise for me to look at the similarities between the two jurisdictions. What I want to do is focus on five cases. All of which are present cases, all of which have involved interventions in some shape or form. I am going to use the word intervention not *amicus curiae* because it is an intervention that we recognise in the UK.

Basically just to briefly explain if an NGO wished to intervene in a case where there is a public interest point or points, that it feels it has a particular expertise in, then it has to make an application to the court which we as the claimants have the opportunity to consent to or not. In every case that I am talking about, I have consented when the application has been made and the court invariably says yes but debate has been about whether the intervener or interveners should have the right to make oral representation or whether they have to make written representations only. One of the cases I am going to talk about, the *Al Skeini* case, which concerns whether the Human Rights Act and European Convention on Human Rights applied in South East Iraq. In the High Court and the Court of Appeal one intervener was allowed only to make written representation. We just finished that case, *Al Skeini* in the House of Lords last Tuesday. In the end, Amnesty International, Redress [The Redress Trust], Liberty, Justice, the Bar Council, the Law Society and EURATOM got together and they were allowed an hour in the House of Lords to present their case. I shall talk more about that in a second.

So just running through the cases so that you get a flavour; there is the *Al Skeini* case which I've mentioned. The second case is another case in the House of Lords called *Al Jedda* which is about a man, a British national, whose been detained without charge, by UK forces in Basra since October 2004. The third case is a case about the legality of the Iraq war, it is a case for the families of the soldiers killed, it is called *Gentle & others*, and this is now the subject of a petition to the House of Lords. The fourth case is a case where we are challenging our government's policy of supplying arms products to Israel. The fifth case is the most recent of the cases that I am going to talk about and this concerns a challenge to the recent decision that our government [UK] has taken to replace our trident nuclear weapons system.

So there are five cases and I think my opening point is that I think you can sense from those cases that these are all very important constitutional issues. First, in the UK, without the Constitution which you have, with an unwritten Constitution, lawyers like myself take the view that judicial review is often the only thing that prevents the Executive having unfettered power, and that is a very real issue particularly when you get a government like we have at the moment, which despite its name is actually highly repressive. It is judicial review that has the power to say, as the House of Lords did on judicial review; 'No, you cannot detain foreign nationals without charge and we issue a declaration of incompatibility' and the government had to start again, and it came with new legislation which you probably know. This lead to a string of case like control order. You can see the power of judicial review.

Some of the other cases where they have all been good examples of recent instances where how important the fundamental issue to democracy is. I have mentioned *Belmarsh*. There was another case from the same group of litigants, concerning whether our government could rely on intelligence which another State had obtained by torture. The court said that that was fine. The House of Lords said that it bloody well was not fine. Then another case recently, which you might have followed, where Greenpeace succeeded in a judicial review about the government's failure to consult with it before the government announced that we were going to have a new generation of nuclear energy plants. The fourth example of this kind of case that emphasises the constitutional importance of judicial review is the *Al Skeini*, case which is one that I am going to talk about.

So it is an over-riding theme of what I am saying that if these cases are of such constitutional significance then it follows that civil society must have a role in some of these cases and should have a role. I have welcomed interventions in my cases. Indeed there are plenty of us human rights lawyers who believe that the reason that the *Belmarsh* ruling, as to whether or not you could detain foreign nationals without charge, was reversed by the House of Lords is that civil society had actively engaged with the issued and the House of Lords would have been in no doubt at all that civil society found this repugnant. So that brings into play the notion of the courts of public opinion.

Some of you may be aware that I wrote an article in *The Guardian* last Monday, which was Day 4 of the House of Lords. I meant the House of Lords to read it. They did. I have said to my team, actually I have got two cases here about killings and torture in detention by UK forces. The first case is in the House of Lords, the second case which is going to continue for a lot longer, is in the Court of Public Opinion. I am battling to expose what I have referred to in this article as an utter disgrace. The problem we have is that underneath the surface of what our troops have done in Iraq are very ugly things, very ugly indeed, and the public just do not want to face up to that.

I think on that note, I will tell you about the first of these cases. It is the *Al Skeini* case and it focuses to a degree, on a man called Baha Mousa, who was

tortured to death in detention in Basra, in September 2003. Along with nine or ten other detainees one of whom was virtually killed and photographs of at least five other men showed that they were very badly abused. Then there is a handful, there is five other cases of killings by troops on street patrols, or whilst carrying out a raid on a house, people going about their business on the street, that kind of thing. They have been selected as six cases of about forty that I am acting in to test three points of law.

Point one: did the Human Rights Act apply extra-territorially in South East Iraq during the occupation, not during the war, the occupation? Secondly, did the European Convention on Human Rights apply? Thirdly, if so, has there been a breach of the procedural obligation which goes with the right to life and the right not to be tortured; which is the right to have an independent, an effective and prompt inquiry, to look into what the lessons are to be learnt from these events.

Focusing on intervention, as I said earlier, there is now a host of NGOs and the Law Society and the Bar Council who has intervened and that has worked very well. We are very pleased that it is not just us because I take the view that there is something deeply unattractive about Phil Shiner said this, Phil Shiner said that, Phil Shiner said the other; when these cases clearly raise issues which are way beyond my capacity to draw public attention to those issues. What I very much want is Shami Chakrabarti, who is the director of Liberty, to be the person who's seen in the public eye. We are now getting to that understanding.

In the House of Lords, by agreement, the interveners had an hour and they focused on comparative jurisprudence; so that was cases before the United Nations Human Rights Committee, cases from Inter-American Court of Human Rights and various other jurisdictions. And they left Strasbourg and domestic law arguments to my team.

There are clearly some issues for you; I was talking to Michael about those over dinner. You would have to think, well, what is the extra-territorial application of your Constitution and your 2003 Act. Your troops have been involved in peace-keeping operations and I am quite clear in my mind that sooner or later if you do not deal with this situation you are going to face what we are now having to face, and what we are facing I believe is many Baha Mousas who have been taken into detention alive and have come out dead. That is the bottom line I think.

I also think I do not know if any of you saw yesterday's Guardian, but if you did, you'd have seen extracts from a Private McKenzie. This is a diary entry that I've obtained from the court martial that is just ended. He makes repeated references to 'Ali Babas' so all Iraqis are Ali Babas, i.e. thieves. And they have been thrown in the river, they are been beaten up, they have been taken from the back of tanks and beaten up. They are being shot, killed. You get the clear impression that not only did we de-humanise Iraqis to the extent that it was not a

problem to beat them to death whilst hooded, but we were shooting first and asking questions later.

I think it is interesting speaking to an Irish audience to reflect that, in 1972 the Heath government banned five techniques. I think probably you all know this but just to run through them. It was hooding, stressing, food depravation, sleep depravation and white noise. We were hooding, stressing, depriving of sleep and depriving of food and we added a few others as well.

I find it astonishing that could have happened. That is this very case of *Mousa* before we came along with our judicial review; they had opened and closed the investigation. The military justice system would have produced nothing, absolutely nothing. What in the end it produced was one man, Corporal Payne will be sentenced today. He pleaded guilty to inhumane treatment. Everyone who pleaded not guilty to anything got let off. It is quite clear from the judgment of the Judge Advocate that Mousa died from ninety-three injuries from a multiple of soldiers who have not been charged because as the judge put it, a more or less obvious closing of ranks. So even an establishment judge is describing what took place as a closing of ranks, a cover-up.

The second case is the *Al Jedda* case and again I think this will be of interest to you to reflect on what your Irish thoughts approach would be. What we have here is post 9/11 in the UK; and the UK has deliberately used the Security Council as a legislative body because they can control it. So now without giving you a long lecture on international law, if you look at some of the Resolutions, 1483, 1511, 1546 are three. What we have done is we have changed international humanitarian law. This is John Bellinger III, speaking quite openly at a public lecture in San Marino in September 2005. John Bellinger III, by the way, is the Senior United States State Department lawyer.

International Humanitarian law does not allow occupying forces to rewrite the Constitution of the state they are occupying. International Humanitarian Law does not allow you to use the proceeds of sale of Iraqi oil on large re-building contracts on the likes of high buildings. International Humanitarian Law does not allow you to detain people without charge on a preventative basis after twelve months of an occupation. 1546 and 1483 together have produced all of those effects. If you have followed this at all, you will have followed the debate on the way in which the multinationals have ex-appropriated the one prize asset the Iraqis have, which is their oil. They have done that through re-writing the Constitution which was put in place during the occupation by the Coalition Provisional Authority but I'll leave that to one side. I'll just flag it because that is what is happening in this brave, new world. The new international legal order where international law is observed if it suits them; it is ignored if it does not. Witness the fact that there was no resolution before the Iraq war and if it can be manipulated to suit their ends then that is all the better.

My client is caught in the middle of a massive issue of Constitutional importance to all of us because he has been detained without charge but, says the High

Court and the Court of Appeal, he does not have the right under Article 5 not to be detained without charge because 1546 has displaced that as a matter of international law. He only gets here in the UK what he gets in Strasbourg. He gets nothing in Strasbourg because it is in the bin therefore he get nothing here.

Now over lunch, that debate lead me to think that a different result would have to be produced, if the person that had been detained had been an Irish national, but I do not think your courts, it sounds like your courts, would not permit that fundamental right, written into you Constitution from 1937 to be put in the bin because an unelected body, political body, sitting in New York said it is ok.

The second case, and again Liberty and Justice have intervened in that case, and they have instructed Professor James Crawford to act for them, who is one of the world's leading international lawyers. I am extremely pleased to see that intervention made. I believe that it will add something when we get to the House of Lords which we do in October.

The third case is the case for the family of soldiers killed. Quite simply they say, well, Article 2 is engaged – the right to life – and again carrying with it protecting that right, is the procedural obligation to have an inquiry. The inquiry they want has to answer the fundamental question; did their boys and girls, and loved one die in circumstances where the military orders were illegal? In the Court of Appeal, the courts have ducked that question and we petitioned the House of Lords. The petition has been drawn up by two of our leading Human Rights Q.C. who has been the same Q.C. who's my Q.C. in *Al Skeini.*

It begins with this bold but I think accurate line, "The most important Constitutional question of our time, which remains unanswered by any court i.e. the invasion question is the most important question." I think that is correct because not only is it about that question can we once and for all, determine in a court whether that war was lawful or not but hidden beneath it there is an even more important question which I think again would be of interest to you. It is the issue of justiciability; when are certain matters of defence policy and high foreign policy a matter for neither judge nor jury? We have had a traditional approach to that which began in 1964 in the case of *Chandlier*, which is the Committee of 100 [tried to prevent Britain arming itself with a nuclear weapon system.

It goes all the way through the civil service case. A case I was involved in called *Mancini* which was about the manufacture of nuclear weapons at Aldermaston and ending in the CND case which I was also involved in and it basically says well there are certain which the courts won't look at. We say, post Human Rights Act, that where there are actual or potential violations of Human rights there can be no forbidden territory.

I mean consider if we had at the very highest level of a decision of foreign policy to export instruments of torture. Can that be automatically out of bounds

because it was a decision taken by the Secretary of State for Foreign and Commonwealth Affairs? I do not think so.

Already some of the material that has come out into the public domain because of this litigation and that we have been able to, well it is not new material, it is material that we have been able to make proper sense of. So there has been, as some of you probably know, obviously we have the Attorney General's advice but we also have these leaked memoranda, the Downing Street memoranda which make it clear to those who can read that Blair committed himself to regime change in April 2002. Everything else worked around that prior decision. But then the Information Commissioner, Richard Thomas, issued an enforcement notice in late 2005 and the government had to respond to that and what is very, very interesting is what comes out of that and I mean I won't bore you with the detail but very late on, Blair and Hans Blitz had committed themselves to a course of action which was going to lead to what is known as a benchmark resolution. Give Saddam a number of benchmarks which he either does publicly meet or does not publicly meet. We will all know where we are and Blair apparently according to Blitz report was very keen on this.

On 7 March [2007], the Attorney General gave the lengthy advice in which he says twice, the question arises as to whether a State, a single State, or States acting unilaterally can declare that there has been such a fundamental breach of the Resolution at the end of the Gulf War, Resolution 687 That breach is so fundamental that it destroys the ceasefire. Goldsmith says that the United States are on their own on this because they think that they can make that unilateral interpretation and we do not agree. I, Goldsmith do not agree and a successive of Attorney Generals has never agreed. This was a live issue because we were bombing throughout the 1990s to enforce the no fly zones. So it is a live issue for the Security Council and other States. So there he is on 7 March saying no that is a matter for the Security Council, only the Security Council can make that decision. Eight days later, seven days later, sorry, he decides because he has been put under pressure that Tony Blair can make that decision because he actually asks him to authorise and confirm that there has been a material breach of 40 and 41 that effectively destroys the ceasefire Resolution from 687. And what is even more fascinating to me is to think well on the key date in question which was 15 March, we are four or five hours behind New York. At the very point when there was still last minute efforts which turned out to be unsuccessful to sign up States to a second resolution. Goldsmith could not have known the outcome, things already decided and he is not going to wait to see whether his long advice is in the bin and he is going to come up with a one page statement where he says, yeah, its quite lawful to go all the way back to the Resolution 678 from November 1990.

That is relevant to intervention because that is an example where I actively discouraged [intervention]. There were people wanting to come in making all sort of spurious points and I felt that the strength of this case is that here I am not acting for Iraqis; here I am acting for soldiers. I thought the strength was that these were individual families with a massive work done for free, but now with

public funding. I did not want groups coming in with all sorts of different agendas which I thought were going to be immensely unhelpful and I did not want them.

The fourth case and the fifth case, which I will take much quicker. The fourth case is a case about our [UK] policy of exporting arms to Israel. We have a policy that is enshrined in what is called consolidated criteria where we are not allowed to export arms related products to countries where any of six criteria are breached and one of the criteria, criteria two is where there is a risk of these products being used for internal repression, bearing in mind what happened in Lebanon and Gaza, last Summer. I am acting for nine Palestinians in various part of the West Bank and not unreasonably ask the question – how did the government satisfy yourselves that there was no risk in circumstances where it is government policy that we cannot accept Israeli assurances on this. We must satisfy ourselves. I asked them to demonstrate that and they refused. We got public funding for judicial review to challenge that whereupon they did a complete volte-face and put in a massive material which demonstrated that the coarser figures that we were challenging, there were forty licences and each and every one of them was beyond doubt in a situation where there was no risk of internal repression.

So we, not unreasonably, said well this is very interesting and very helpful but what about the future. Are we supposed to challenge through judicial review every coarsest figure? We want this information, or this kind of information, put in the public domain at the present time in respect of Israel. Some of you may know that the issue of international law and Israel's compliance with international law, in respect of the wall, went to the International Court of Justice in July 2004. It is the subject of a lengthy opinion which identifies eleven different breaches of International Law by Israel and seven obligations; some of them *jus cogens* and *erga omnes*, that other States have one of those obligations not to render aid or assistance to Israel. So again it is an important issue.

There are many of us in the UK who are deeply concerned at our government policy towards Israel. Again on the subject of intervention, I actively encouraged, unsuccessfully this time, various NGOs such as the Campaign against the Arms Trade, the Palestine Solidarity Campaign, and War on One to intervene. I think they got an unnecessary amount of caution. They seem to think that there is some issue about costs even thought they have been repeatedly assured that an intervention can be made without there being any risk of cost. So we are happy to go it alone. But I would very much have welcomed the intervention and we have now got what is called a rolled-up hearing in a few weeks where the decision as to whether we can get permission to bring the case and the decision as to whether we succeed will be dealt with in one single go. This is effectively the courts way of dispensing with the commission stage.

The last case which I shall take very briefly because I do not want to overrun my time is a case about the recent decision which Blair has promoted vigorously that we are going to have a new nuclear weapons system. The problem is, well, I got two problems. The first is that myself on behalf of an NGO, commissioned an

opinion from Robin Darlinq QC and Professor Christine Chinkin which said two main things; that a decision to retain Trident or to replace it with a similar system would breach international law for two reasons. One because it would breach the rule of discrimination that a weapons system must be able to discriminate between a military objective and civilians; and plainly with a nuclear weapons system that is ten to twelve times the size of Hiroshima, Trident can never do that. The second point is that an obligation under the nuclear non-proliferation Treaty which was strengthened in 1996 when the matter went to the International Court of Justice. It was a tough obligation to conclude negotiations that lead to complete disarmament. We say a decision to replace Trident that takes us twenty-five years down the road where we have got a nuclear weapons system seems to be going in the wrong direction compared with that duty.

All along, the government lead the public to believe that there would be consultation; except when we got the White Paper in earlier December, they had changed their mind. The word consultation now became debate as in parliament debate or you can write to Tony Blair if you want and tell him you don't like his idea. But there was not the consultation that was fatal for the government in the Greenpeace case, I mentioned about nuclear energy. My client, an NGO, has instructed me to make a claim for judicial review. That decision as to whether or not they get permission has not yet been made but I can not believe that we won't be having a full public hearing on that, in the not too distant future. Again, I have made active efforts and I am still in negotiation with Greenpeace because I want them to intervene. It will look much better if it is seen as being an issue that engages with organisations like Greenpeace.

So just wrapping that up, first point, these are obviously issues of constitutional importance. I think that there is a clear role for civil society through NGOs and that in most of these cases I have actively encouraged and gone out of my way to meet, and do, everything that I can to get that intervention made. Second point, interventions are of age in the UK, it sounds like they are just starting out here. In fact, it sounds like the whole concept of Public Interest Litigation is quite new to you here in Ireland. I for one am beginning to form the view now as to where interventions play their part. You obviously do not want an organisation, say like Liberty, intervening every five minutes every time there is a case where there is a supposed public interest, and Liberty would never do that. But it is quite right that those sorts of organisations should come in a small number of cases.

I believe passionately that NGOs have got something extra to bring here not just in terms of the argument but in terms of what I refer to as the Court of Public Opinion, it is naïve to believe, and I do not believe it, that I can possibly win whatever it is that I am trying to fight against. In *Al Skeini* litigation, that cannot be won the House of Lords, the House of Lords can do something very, very important which is to say you get an inquiry i.e. the military justice system has to come to an end, but the bigger battle is about the media and can we get to that tipping point when enough decent people in civil society, but particularly in the military, say enough. We are going to reform our military, we are going to

train our troops to observe human rights standards, we are going to introduce a new culture where the way you let down your regiment is to cross these lines. This is not about money and this is about supporting our troops. If you ask troops to engage in all these difficult tasks which we do in Afghanistan, Iraq etc and you send them into battle without the right equipment which we did, literally, in terms of boots etc but also in terms of training. Our troops did not have a clue what they were supposed to be doing. They clearly did not know that they were not supposed to be hooding because it was not just one regiment and I say we have let our troops down. So in terms of interventions, and the Court of Public Opinion that is where I think it all ends up. So I would be a passionate proponent of interventions until society, bring it on, but not too often, so as to bring the strategy into disrepute. Thank you.