Third Party Interventions – The Northern Ireland Experience

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What I am proposing to do is to give an overview about how the use of third party interventions and litigation strategy has developed in Northern Ireland over the last five plus years. Really, I think in large parts since the establishment of the Northern Ireland Human Rights Commission. The difficulties, which were encountered at the outset by organisations which were seeking to intervene, difficulties which I think mirror difficulties faced by organisations seeking to intervene in this jurisdiction, and how the matter is dealt with currently by the courts. And hopefully, give a brief review of its effectiveness as a strategy, with reference to cases with which I have some familiarity. And looking at some of the mechanisms we are thinking about in terms of improving effectiveness, both in terms of identification of cases, and also the issue which arises for us constantly and which I think will arise for you in due course, about whether interventions should be in writing or oral. Because that does raise some significant issues.

The focus will be on the work of the Human Rights Commission. The reason for that is simply that the Human Rights Commission is an organisation that through its case work committee, when an issue was established, it identified third party interventions and a litigation strategy from its inception. So this was an approach that they had identified for two reasons I think. Firstly, because relative to funding cases yourself, to being the actual organisation assisting the applicant in taking the case, obviously an intervention of a more limited role, and thus is a more cost method of participating in cases. And thus, this permitted the Human Rights Commission to focus on its legal priorities within the case without necessarily embracing all of the issues that the applicant wishes to advance. But specifically also focusing on the Convention standards; but also, on comparative jurisprudence in terms of the work of the UN Human Rights Committee and also the Inter-American courts and trying to use that case as an opportunity to feed that jurisprudence into the domestic legal system.

From my perspective as counsel, I have appeared on behalf of the NI Human Rights Commission, both in interventions where they intervened orally and in writing. Other organisations which have intervened, the Northern Ireland Commissioner for Children and Young People, Children's Law Centre, I've also acted for those. I've been counsel for applicant, and the applicants have sought interventions from groups like the Human Rights Commission and also from NGOs such as the Committee for the

Administration of Justice or Amnesty International, in order to bolster and assist us in terms of presentation of cases which are of more general public importance. I should say that while a lot of the cases relate to the Human Rights Commission, the views are not those of the Human Rights Commission but are my own.

The Human Rights Commission was established under the Northern Ireland Act 1998, and our Human Rights Act, which is the 1998 Act, came into force in October 2000. Prior to the coming into force of the Act, what I was going to do was to focus on the number of interventions made at the outset, prior to the incorporation of the Convention and how they worked and were effective, or not effective, as was sometimes the case.

The first case was a case *Treacy & Mac Donald*, which was a challenge by two successful applicants to the senior bar who were challenging the obligation to make a declaration of loyalty to the Queen, which QC were obliged at that time to take. And the HRC intervened both in writing and orally, in front of the High Court, and its submissions focused exclusively on international standards and international human rights standards, while the applicant's submissions were significantly more broad ranging. At the same time the HRC intervened in the case of Adams and the DPP; a case in which a High Court judge had determined that police officers had assaulted an individual who was arrested. He was awarded £30,000 in damages and the assault involved things like breaking limbs, and puncturing of lungs, and he ended up in critical care in the Royal as a result of the assault sustained. The DPP then decided that despite the decision of the Civil Court about the liability of the police that this wasn't an appropriate case to prosecute.

The HRC again intervened in that case. The focus of the case was on the failure of the DPP to give reasons for decisions not to prosecute, which I understand has been an issue litigated here. But the HRC focused on issues to do with Article 3 [European Convention on Human Rights] rights. The right not to be tortured, and specifically the right to a proper and effective investigation of the circumstances in which someone sustains ill treatment at the hands of the security forces. The intervention in that case *(Treacy & MacDonald)*, the case went to the Court of Appeal and then to the High Court because intervening was the decision of the High Court.

The third challenge that I am going to deal with briefly, the Evelyn White case, was a challenge to the composition of the Northern Ireland Parades Commission. And specifically, on the failure to appoint a woman as a member of the Parades Commission. The Human Rights Commission were

permitted to make written interventions, but were refused to make oral interventions and a judgment which may find some reflection in the judgments made here, and this is the Doherty case. The then Lord Chief Justice, Lord Carswell, stated that he didn't think that it was proper in cases where it was justified to give leave to an intervener to present oral argument but leave should be sparingly given, certainly at first instance. But he went on to say that a judge at first instance should give leave when there is an issue of sufficient consequence which cannot be adequately dealt with by counsel for one of the parties, which effectively put interveners in a position of suggesting that the applicant wasn't presenting the case as fully, or as appropriately, as they might otherwise do. When in fact, really what the intervener is trying to do is give a somewhat different perspective.

The final intervention I want to deal with – pre-Human Rights Act – was the intervention which led to the Human Rights Commission not, for a two year period, having a right to intervene, and that was in relation to the inquest into the Omagh bombing. In the first instance the Commission were expressly invited by the coroner to attend as an *amicus curiae*, and to provide the court with assistance in relation to the issues; particularly, in relation to discovery to the families of documents. I'm not sure what the practice here is. But in the North when inquests were held the family of the person who died did not receive any documentation about the inquest until the witness go into the witness box. You go along and you prepare for your inquest and then when the witness gives his statement, you are then handed it and you then react to it. That was the system and we were invited to make representations on that issue. And there was obviously a developing jurisprudence at the time about how investigations should be conducted after death.

This is a time prior to the *Jordan v UK* decision, which obviously the police? can run the discovery in a much wider way and submissions were made in relation to that issue. Subsequently an issue arose about the scope of the inquest, and specifically about the power of the coroner to investigate the conduct of the police. And this is an issue which some of the families were raising, and that was whether in fact there had been any failings on part of the police in terms of acting on warnings, and the kind of intelligence that they had been aware of prior to the bombings. And it was at that stage that the Human Rights Commission, on the back of the decision by the Lord Chief Justice in the Evelyn White case, decided that the commission couldn't intervene which is really similar to the Equality Authority. We had no power to intervene.

In terms of the cases, the first case, a case which related to the two QCs. Their application for judicial review was successful but not on the human rights issues. The Adams case was unsuccessful on all fronts in the High Court, and also in the Court of Appeal. In the White case the applicant was successful. And ironically, in the Omagh case we were eventually asked to leave. In fact, in that case in terms of practical impact, it seems that the submissions that were seen by the Court had the most impact, as they did actually provide discovery to the families, and they did actually broaden the scope of the enquiry during the conduct of it. And the other significant factor was that the families began to adopt many of the arguments that, until that time, only the HRC had been making.

But in terms of success or otherwise, I think that the HRC at that stage could legitimately have regarded the interventions as being successful in a number of different ways. These interventions all took place pre-incorporation, at a time when the Convention rights absent the Constitution, so therefore depended on public law concepts related to rationality. That was the effective method of judicial review and we were about to be introduced to a rights-based culture which exists here because of the Constitution but which didn't exist in the same way in the North or in England. And it really was an opportunity for the HRC, prior to incorporation, to introduce the concepts that were allowed in Strasbourg, and the comparative law standards, to the Courts. And not just to the Courts, but to practicing lawyers who were not only unfamiliar with this area of work but this type of work. And I certainly think that it was an opportunity which was useful in terms of heightening awareness of, both the judiciary and of practitioners, about the manner in which international standards can be used to assist cases even if they weren't necessarily going to be the ultimately deciding factor. And also, to introduce a discourse on international human rights into the case, and I think that to that end the contributions were useful and effective in terms of the Human Rights Commission's overall objectives.

I would have to say, the Omagh inquest case was interesting in that at the time the HRC was intervening none of the families represented from this jurisdiction, Northern Ireland and lawyers in Britain, were raising Article 2 ECHR [right to life] issues. Which clearly now, in light of judgments of *Jordan* and *McKerr* and other judgments of the ECHR, are very pertinent to how investigations and corners inquests should be conducted. But at the time the coroner, in fact, began by getting the HRC to intervene **and six issues which don't play** directly in the inquest forum. So in terms of, in a practical sense, concepts were being introduced in the legal system that had simply not existed before that time.

In relation to the *White* case it's certainly my perspective that, not only were the comments of the Lord Chief Justice unhelpful in terms of the ultimate development of intervention, but I would raise real questions about the HRC's own legal strategy. The issue they were intervening on was an equality issue and we do have an Equality Commission. And there was the question mark if this was the proper course and function of the HRC priorities, and the balance between the two organisations. And also, international standards added little to the debate which essentially was a challenge on domestic law standards. And the strength of the case was based on those challenges. So it does raise the issue, and it was an issue at the time, about the need, the courts are very keen that organisations should be restricted and slow to intervene. But the truth also, I think, is on organisations to consider how strategically to identify cases which will promote your perspective, and not to be getting involved in cases which will not benefit the applicant or the organisation seeking to intervene.

The upshot of the Omagh inquest case was that, and it was a significant blow to the HRC to mount an effective litigation strategy at a crucial time, because from September 2000 through to June 2002, when the House of Lords eventually handed down its decision. The HRC couldn't intervene and in that key period the HRC was effectively silenced in terms of the Court. Ironically, in the House of Lords itself, there were interventions. The Secretary for Northern Ireland intervened, orally and in writing, on behalf of the Commission, and Amnesty, Human Rights Watch and CAJ – three NGOs – put a joint written submission again in support of the HRC. So in the case where the discussion about whether the HRC as a statutory body could intervene. Everybody else, bar the HRC, certainly have that power.

The House of Lords judgment, while it obviously was a welcome judgment, certainly was not a charter for interveners, at least in terms of restricting intervention, it's ultimately a matter for the court. And somebody asked earlier about the history and the origin of intervention. Effectively it has evolution of the inherent jurisdiction of the Court, and there are now rules in the House of Lords. They have a specification section, rules of intervention in the House of Lords about procedure set out. But our High Court and Court of Appeal do regularly enough to receive interventions. There's no set procedure, that the practice is that when an origination identifies a case in which they wish to intervene they put the parties on notice and they make an application in writing, or if necessary orally, to intervene, and they do so with the permission of the court. Generally, with the consent of the parties although either party can object to intervention. Usually the procedure is that, at the first stage you intervene in writing, and then the position on whether or not you intervene orally tends to be decided at a later stage when the case progresses.

But, in terms of current practice, at the outset there was undoubtedly hostility by some members of the judiciary to the concept of intervention, and certainly a common feature in three of the cases where difficulties arouse was the then Lord Chief Justice, now Lord Carswell, in the House of Lords because he featured in the *Adams* case, and then at second instance in the *White* case, and in the Court of Appeal decision to intervene. One of the Lords Justices, who formed part of the majority, was very concerned to permit the HRC to intervene was to breach the respondents human rights because it was weighing the bias against the respondent; bolstering the case of the applicant. But there is now comparative openness to the concept of intervention. Undoubtedly assisted by the House of Lords judgment which gave sanction to the concept and also to the fact that the House of Lords itself does in important cases regularly permit and welcome intervention, particularly by non governmental organisations.

The HRC has, since the judgment of the House of Lords, intervened in sixteen cases, and has not been refused to intervene in any case. Albeit they have been sometimes been limited to written interventions when they have sought to make oral interventions. And it is also interesting, I think in terms of the tendency to say that it is a matter for the higher appellate (the Court of Appeal, the House of Lords) that that's the forum that interventions should be most likely. But certainly, the HRC has intervened in a range of different courts and many of those courts in real terms are going to be the courts of final jurisdiction, in terms of the point to be litigated and argued. They intervened in the Employment Tribunal which is the tribunal which would determine the religious and political discrimination. They have intervened directly in coroners inquests from the **proceedings courts** in relation to Article 8 EHCR [right to respect for privacy, private and family life] issues. They have intervened in criminal cases; unusually, that they have intervened in the Criminal Court in relation to the protection of fair trial rights, interventions have been public law proceedings. And also, interventions in the House of Lords in cases of general importance which they consider that the NIHCR would have an interest in.

Since the HRC case it's not just the HRC, but NGOs have increasingly begun to participate in interventions in their own name on independent issue. And perhaps, an example of a case in which an NGO intervened was a challenge by the Family Planning Association in relation decisions of the Department of Health. You are all obviously familiar with the debate about the legality of abortion. The situation is that the 1967 Abortion Act doesn't apply to NI. But we are governed by the 1861 Offences Against

the State Act and the courts of NI do permit local abortions. So the Family Planning Association's challenge was to the Department of Health's failure to give clear guidelines on the circumstances in which abortion can be legally carried out in Northern Ireland. There were three interventions in that case, both at the High Court level and the Court of Appeal, all against the Family Planning Association, by the Northern Catholic Bishops made an intervention, SPUC intervened. And I suppose what was interesting was that the Courts permitted three separate interventions, all arguing for the same position albeit it has to be said from different perspectives when you actually look at the submissions. So these three organisations were separately represented at each level, and intervened both writing and orally. And, it is an interesting example of how quite specialist organisations can identify cases in which they may have a very narrow interest and may not be generally classed, like FLAC or CAJ, as having a broad interest in litigation strategy, generally, and may have a very specific interest in an issue of importance to their membership and can afford an opportunity to intervene, and seek to influence. The Family Planning Association lost in the High Court but won in the Court of Appeal. But ultimately their interventions were unsuccessful.

On that issue, two more recent cases, which have involved non governmental organisations and statutory bodies, illustrate some of the difficulties. The **Meehan** case which was heard in the High Court and the Court of Appeal was a challenge to the ASBOs, which I think are now a feature here as well. There had been challenges in England under the Human Rights Act which had been unsuccessful. But the challenges in Northern Ireland were based on a discreet piece of legislation, section 75 of the Northern Ireland Act, which places an obligation on public bodies to promote equality and opportunity, and requires public bodies, if they are making decisions, to consider its impact on disparate members of the community. So, for example, they should consider whether a particular measure is likely to have a disproportionately adverse effect on people on the grounds of religion, or on the grounds of gender, or disability, or other grounds.

I appeared in that for the Northern Ireland Commission for Children and Young People and the Children's Law Centre. Both were arguing that ASBOs disproportionately impacted on young people; as it is young people that they are predominantly used against. Ironically, the actual applicant in that case was over 25. And so, it is an example how the interveners had a very specific agenda, which was not reflected in the applicant itself, but that the litigation provided an opportunity to articulate that perspective and for the courts to scrutinise the legislation

from a perspective that wasn't confined to the applicant. CAJ also intervened. Their focus was different, having been involved in the legislation and having been prime users of section 75 of the Northern Ireland Act they were concerned about issues of justiciability because there were challenges on whether or not you could actually rely on this section in judicial review proceedings. And the Equality Commission was also participants; at this stage I can't remember whether as notice party or as interveners, because their status at some stage changed during the proceedings. But the focus of the interveners was quite different. At that stage the case was unsuccessful in the High Court. But at the High Court level, for the Northern Ireland Commissioner for Children and Young Persons and the Children's Law Centre, the issue that they wished to advance in many ways was reflected in the judgment albeit unsuccessfully and if they didn't have issues that they wished to pursue at appeal level. CAJ on the other hand did have issues in relation to the questions about whether you could judicial review on the back of section 75 - a point which was ultimately abandoned by the respondent at appeal.

So again it's an illustration of a perspective that an individual was a recipient of a prospective ASBO and was **open to a challenge** not to be subjected to it. But the two interveners had two quite disparate and distinct views, which were completely different in some ways, although supportive of the applicant, not necessarily supportive of his personal decision.

I do think that in terms of the debate about whether interventions should be left until it gets to the stage of the Supreme Court, as opposed to the earlier level, it removes and irons out issues which don't need to be appealed any further if a timely intervention at an earlier stage can in many ways resolve issues. In this case the respondent had made concessions as a result of the intervention, and I think it can be effective at the earlier stage and there's always the risk that, in some way, by the time the case gets to the appeal stage the issue had crystallised to the point where the opportunity to advance a particular issue that the organisation wishes to advance will have been lost. Because that will be part of the debate and discussion that the court is going to have and the issue will have narrowed more than the human rights issues that have been raised at the outset.

This brings me to the issue of written interventions rather than oral interventions. The HRC intervened in a case you will be familiar with, enquiries effectively arising from the Good Friday Agreement. And originally the enquiry into Mr White's death was being held under the

auspices of a Prison Act and they shifted it, converted the enquiry into an Enquiries Act. There was a new Enquiries Act in England and there are many concerns about it. In particular, concerns that it curtails investigations in a way that really is not compliant with Articles 2 and 3 of the European Convention. The HRC intervened, and I should say the applicant's challenge was a challenge on many grounds: lack of consultation, compatibility of Convention law, and a number of other domestic challenges which the Human Rights Commission didn't take specific interest in. And therefore was exclusively about compatibility of the Enquiry Act regarding Articles 2 and 3 of the Convention in appropriate cases. The CAJ again made separate submissions and they were more general in nature because the CAJ had been one of the consultees in the process and had been central in terms of obtaining an enquiry for Mr Wright's family in the first case. The case was ultimately decided on public law principles. It's just on appeal to the Court of Appeal. Public law principles in relation to converging on law, so no decision was made as to whether or not the Enquiry Act was compatible, an issue which I'm not sure has arisen here, because of the date of Mr. Wright's death, because it predates the incorporation of the Convention.

It has now become, since the recent House of Lords authority, an issue whether we can use that judicial review to challenge this issue. That said, from the HRC point of view, it was important that it gave us an opportunity to challenge, at an early opportunity, the compatibility of this legislation with the Convention standards. And in retrospect, I would have to say that, I think, in terms of impact that can very frequently be a mistake not to participate and intervene orally.

I should say that the distinction between the *O'Neill* case and the *White* case was that in the *O'Neill* case, initially the parties had given the right to make written submissions and then took watch and brief in the case, and basically made submissions for the use of the applicants submissions, whether we could use a base as to whether we could intervene orally and in all cases; all parties actually did intervene orally. In the *White* case we simply made written submissions and there wasn't watching brief and we didn't invite the court to hear us orally in due course.

If the Convention is adopted by the applicant then it certainly has greater impact. I think that, in many senses, in a case or indeed in a system where oral advocacy is a central part in how judges deal with advocacy, written arguments don't really have the same impact, in terms of decision making, and in terms of real impact. Just in terms of real impact, while it's more cost-effective I'm not sure if it's more effective in the long term. In terms of the usefulness of interventions, I think that, firstly, even if

interventions don't achieve victory, the type of expertise that interveners can provide for a case, whether it's specialist understanding or whether it's human rights law, or particular areas of law, can influence a judgment even if it's decided on different grounds to that extent. The case which I am involved in, which is going to the High Court at the moment, is being taken up on behalf of one of the parents of the children who was involved in the Leas Cross protest and would challenge **the police**.

And also of course in terms of looking at comparative law jurisdictions. I think that may practitioners find it difficult to keep on top of domestic law issues. Convention standards which in our case are something which directly impact us and can be a lot harder to keep on top of; Inter-American law, and case law of the Human Rights Committee. If that's your solicitor brief then it's a lot easier to do the work. But if your brief is to represent the case one way or another, you focus on the issues which would be traditionally on your standards; and, I think from that point of view that intervention can be hugely important. I do think that it is important that organisations be strategic in identifying cases. And, I think a big difficulty is, an issue which organisations are considering, is that areas in which organisations would wish to intervene in a strategic way are dependent ultimately on the applicant, or the applicant's legal representatives, identifying the case and saying this would be a case for the CAJ or this would be a case for ICCL, and the reality is that many applicants don't have that kind of relationship with the organisations and cases are missed.

We don't have a system in Northern Ireland, and I understand they don't have a system either for identifying and targeting cases. But it does seem to me that, in the longer term, strategies need to be developed in terms of organisations clearly missing out on an opportunity to intervene in cases which the lawyers for whatever reason may not want, or may not identify, where a Human Rights Commission or NGO could be of assistance.

I also think one final word of caution that it is important to interveners to co-operate. Clearly an intervener's role will be different to that of an applicant but a level of co-operation is obviously afforded. In one important case in which an NGO intervened, we had invited them to intervene, and were welcoming the opportunity. There should have been a rapport in terms of the issues but the argument was the intervention, perhaps because we hadn't discussed how the case was going to run practically. The Government's argument was that this was going to open the floodgates and we argued that this wasn't going to affect that many people at all. The NGO came in and said this was going to affect hundreds of people. It is important that if organisations are going to

intervene, obviously you have your own agenda, but it is important to have some level of co-operation so that you are not destroying the object of the exercise. That covers my talk at this stage. Thank you very much.