TO ASSIST THE COURT:

THIRD PARTY INTERVENTIONS IN THE PUBLIC INTEREST

Freshfields Bruckhaus Deringer

JUSTICE

AUTHORS

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FOREWORD

Perhaps the most remarkable development in my time in the law has been the growth of public law cases. Fifty years ago there were hardly any. The principal diet of the House of Lords consisted of commercial and tax cases. Now the Supreme Court is predominantly a court of public law, often performing the role of a Constitutional Court. The Human Rights Act 1998 is in part responsible for this. Courts for the first time have to rule on the legitimacy, under international law, of Acts of Parliament and to consider areas, such as the conduct of our armed forces in action abroad, that would once have been held non-justiciable. Sometimes the Court is required to apply a test of proportionality when balancing individual rights and the public interest.

Another growth area has been the creation of both governmental and non-governmental bodies whose role is to protect the public interest in one form or another. At the forefront of the latter has been JUSTICE, celebrating its 60th birthday next year. An important activity of such bodies has been the intervention, to protect the public interest, in actions where this is involved. Intervention can only take place with the consent of the court in question, but in general the courts have welcomed, and the parties have not challenged, the help that interveners can bring. Often they draw on experience, or knowledge, that the individual litigants do not share.

In these circumstances I was not the only person dismayed by section 87 of the Criminal Justice and Courts Act 2015. This robs the court of the discretion that it normally enjoys by making it mandatory to award costs against an intervener in a number of specified circumstances. These might well justify a costs order in the discretion of the court but now such order is mandatory, save where there are "*exceptional circumstances*" that make it "*inappropriate*". The most problematic circumstance is where the intervention has not been "*of significant assistance to the court*".

Clearly this provision could have a chilling effect on interventions. But every cloud has a silver lining, for JUSTICE has responded to section 87 by producing this invaluable and detailed guide to intervention. If it is followed, as it should be, it will assist interveners to ensure that they always add value to the court's deliberations and are not at risk of being penalized in costs.

The Right Honourable
The Lord Phillips of Worth Matravers, KG, PC
May 2016

INTRODUCTION: INTERVENTIONS AND THE PUBLIC INTEREST

1. What is a third party intervention?

Introduction

1.1 It is an old saying that there are at least two sides to every case. A problem for the courts is what happens when there are more than two. Our system of justice is limited in two very crucial respects when it comes to the courts determining important points of public interest. First, the courts are not proactive. No matter how pressing the issue or uncertain the relevant law, they generally have no jurisdiction to hear a case unless and until one is brought before them by two or more parties in dispute. Secondly, our adversarial system means that the courts rely on those fighting parties to bring to light not only the essential issues in a case but also all the relevant evidence and legal arguments.

1.2 There are excellent reasons for these constraints, not least that the courts already have their hands full without needing to create more work. However, while this system works well for the most part, from time to time there are cases in which the contest between the parties fails to provide the court with all the information it needs to determine the issues at hand fairly.

1.3 This limitation is especially problematic when the courts are called upon to decide questions of major public importance, with implications going beyond the facts of the case at hand. This is particularly true of cases before our highest courts, the Supreme Court and the Privy Council, and in those courts which have jurisdiction not only in the UK, but also across Europe: the European Court of Human Rights and the Court of Justice of the European Union.

1.4 Judicial decisions, particularly in such instances, do more than merely decide disputes between, or determine the guilt or innocence of, individuals. They decide how the law of the land is applied to us all. Against this background, it is perhaps unsurprising that independent evidence and submissions on the scope and impact of the law may assist judges to reach a fairer and more sustainable result. The valued role of the third party public interest intervener is to assist the court in making better law.

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> Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case.
>
> Joint Committee on Human Rights Report on the Criminal Justice and Courts Bill.[1]

1.5 Over the last three decades, since the courts in England and Wales first accepted a modern public interest intervention, in the case of ***R v Khan*** in 1996, a body of case-law and practice on the role of third party interveners has evolved under close scrutiny by the courts. Now, for the first time, in the Criminal Justice and Courts Act 2015, Parliament has intervened.

1 Thirteenth Report of 2013–14, *The implications for access to justice of the Government's proposals to reform judicial review,* paras 91–92.

Breaking ground?

In 1996, Liberty was granted permission to intervene by the House of Lords in ***R v Khan***. This was a case about surveillance and Liberty's written submission focused on the requirements of Article 8 of the European Convention on Human Rights (***ECHR***), the right to protection for private and family life, home and correspondence, and its relevance to the case.[2]

The global experience: In other common law jurisdictions, such as the United States, Canada and South Africa, third party interventions before the courts have long been the norm. The first case before the US Supreme Court involving a non-governmental organisation (***NGO***) as intervener was in 1904,[3] and amicus briefs are filed in more than 90% of cases heard by that court each year.[4] Consistent comparative practice across Supreme and Constitutional courts globally support the contribution made by third parties in important cases with a constitutional impact or any wider public interest.[5]

1.6 Since the mid-80s, JUSTICE has pursued interventions with the aim of furthering its goal of securing a fairer, more effective, justice system, capable of protecting individual rights – first, in the European Court of Human Rights and then in domestic courts. We were first granted permission to intervene in the domestic courts in 1997 – in the case of ***Thomson & Venables***, on the treatment of children during criminal trials[6] – and we were the first NGO granted permission to intervene in the Supreme Court.[7] Statistically, we remain one of the most frequent interveners in the Supreme Court. Many other charities have a long history acting as third parties in the public interest, including, for example, Liberty, Amnesty International, Shelter and the Howard League for Penal Reform.

2 [1996] 1 WLR 162. For commentary on the impact of this early intervention, see Richard Mainman, '*We've had to Raise our Game': Liberty's Litigation Strategy under the Human Rights Act 1998* in Halliday and Schmidt (eds) *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights In the National Context* at paras 106–107.

3 The Chinese Charitable and Benevolent Association of New York submitted an amicus brief in *Ah How v United States*, 193 US 65. For further details, see Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (OUP, 2008) at 40–41. Note that in the US, *amicus curiae* is the established term for third party interveners – not to be confused with the more neutral role of an *amicus curiae* in UK courts.

4 See Collins, ibid, at 46.

5 JUSTICE, *To Assist the Court* (2009), Part 3.

6 *R v Home Secretary ex parte T & V* [1997] 3 WLR 23. JUSTICE's written submission provided a detailed analysis of the UK's relevant obligations under international law, including the UN Convention on the Rights of the Child.

7 *HM Treasury v Ahmed* [2010] UKSC 2.

To Assist the Court: JUSTICE was granted permission to intervene in the first case to be heard by the Supreme Court: ***HM Treasury v Ahmed***. The case addressed questions surrounding the legality of a sanctions regime imposed by an Order in Council. JUSTICE's written submission focused on the principle of legality, restricting the power to interfere with the fundamental rights of an individual without clear Parliamentary authority.

1.7 Over the years JUSTICE has worked to highlight the need for clear guidance for courts, public bodies and NGOs on the treatment and conduct of interventions. In 1996 in *A Matter of Public Interest*, JUSTICE and the Public Law Project called for the creation of a clear practice direction to govern third party interventions.[8] In 2009, we revisited this work and called on the Supreme Court to adopt a consistent approach in its treatment of interventions.[9] While the Supreme Court Rules 2009 (***Supreme Court Rules***) now recognise a clear and valuable role for public interest interventions, a new statutory framework on costs introduced by the Criminal Justice and Courts Act 2015 has brought with it a new degree of uncertainty for interventions in the High Court and the Court of Appeal in England and Wales.

1.8 The need for guidance is perhaps greater now than at any other time. This new guide is not designed to be neutral. It cannot hope to be comprehensive.

1.9 This guide (the ***Guide***) is designed to provide an introduction to the process of public interest intervention in the UK courts, before the Court of Justice of the European Union and in the European Court of Human Rights. It is designed primarily for use by civil society organisations and by lawyers who may encounter a third party intervention in their practice.

1.10 In outlining good practice in the UK and in Europe, the Guide hopes to inform the development of future good practice on third party interventions:

(a) Part A sets out some of the key challenges for NGOs and others considering pursuing a public interest intervention;

(b) Part B outlines the procedures for intervention before a number of key courts and tribunals in the UK and in Europe. It is designed principally for use by lawyers preparing advice for would-be interveners; and

(c) Part C considers some key challenges and recommends some improvements for future practice. It reiterates the need for greater legal certainty and the benefits created by clear rules supported by tailored practice directions for interveners.

8 JUSTICE and the Public Law Project, *'A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases'* (1996) pp32–33, 38–39. These recommendations were reflected in Part 54 of the CPR which provides for any person to be heard on a judicial review application, subject to the permission of the court.

9 JUSTICE, *To Assist the Court*, (2009). Herein '*To Assist the Court* (2009)'.

Public Interest Intervention in the UK

1.11 An *intervener* is distinct from a *party* – whether claimant or defendant, appellant or respondent, prosecutor or accused. A party has a direct stake in the outcome of the case, whereas a third party intervener does not. Generally, a third party intervener should not be confused with:

(a) **An interested party**: an interested party is someone who is identified by either the claimant or the defendant as being directly affected by the case (in particular, the relief that may or may not be granted by the court depending on whether it finds for or against the claimant).[10] An interested party may also be added to the case by the court itself, where it appears to the court that it is desirable to do so to resolve a dispute or issue.[11]

(b) **An *amicus curiae***: from the Latin for 'friend of the court', an *amicus* was traditionally a neutral figure invited to assist the court with submissions on a point of law, e.g. on the interpretation of foreign law. From time to time, however, an *amicus curiae* might be asked to take on a more adversarial role on behalf of an unrepresented party (e.g. a child in divorce proceedings).[12]

In the US and elsewhere, an *amicus curiae* is the established term for a third party intervener. In the UK, however, the *amicus curiae* (nowadays referred to as an 'advocate to the court') remains a largely non-partisan figure, appointed by the Attorney General at the request of the court.[13]

(c) **Public interest litigation** in general: Interventions are only one form of public interest litigation. The other, more well-known, form is where an individual or NGO acts as the claimant in a case, either in their own right or on behalf of some larger class or category of affected persons.[14]

1.12 Finally, it is important to distinguish between two kinds of third party interventions, those where the intervener is seeking to represent the *public* interest, or merely his or her own *private* interest. This report is concerned only with interventions in the public interest. However, the distinction is not always an easy one to draw.

10 See CPR Part 54.1(2)(f), defining an 'interested party' as *"any person (other than the claimant and defendant) who is directly affected by [a] claim"* (Part 54.1(2)(f)) [emphasis added]. An interested party can be named as such by either the claimant (in the claim form) or the defendant (in the acknowledgment of service). In *R v Rent Officer and another ex parte Muldoon* [1996] 1 WLR 1103, the House of Lords held *"that a person is directly affected by something connotes that he is affected without the intervention of any immediate agency"* (per Lord Keith).

11 Part 19.2(2) of the CPR allows the courts to add a party if it is either *"desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings"* or *"if there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue"*.

12 See e.g. *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266 per Salmon LJ: an amicus's role is *"to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf"*. See also e.g. *Re Northern Human Rights Commission* [2002] UKHL 25 per Lord Slynn, referring to the *"non-partisan advisory function of the amicus' (para 15) and the 'necessary disinterested quality that one seeks in an amicus curiae"* (para 18).

13 Indeed, most of the representative functions previously performed by *amici* in English courts have now been taken over by more specialised offices, such as the appointment of litigation friends to represent children. For further discussion of *amici curiae* see JUSTICE/Public Law Project *A Matter of Public Interest* (1996) at pp 34–37 and *Secret Evidence* (JUSTICE, 2009) at pp 171–173.

14 See *'A Matter of Public Interest'*, pp 9–13. See n.13.

1.13 In most cases in England and Wales, someone whose private interests are directly affected by a case could reasonably expect to join a case as an interested party.[15] In *A Matter of Public Interest*, JUSTICE and the Public Law Project stressed the importance of the distinction between public interest interventions and interventions serving the direct interest of an individual or organisation:

> *"[I]n the case of a public interest intervener those interests will not be like those of a directly affected party who ought to be brought into the proceedings under one or other [procedural rules]. Rather, the interests in question are likely to consist of a defined, and no doubt emphatic, policy stance as regards the subject matter of the issue being considered. ... it is of the greatest importance to differentiate an interest of this kind from the personal interest of a party whose pocket or liberty is affected by a decision taken by a public body."* [16]

1.14 Government ministers[17] and public bodies[18] are regular interveners in cases before UK courts, and the UK Government is itself an occasional intervener in cases before the European Court of Human Rights (***ECtHR***) in cases involving other Council of Europe countries.[19] On the one hand, public bodies have an obvious interest in cases which concern the areas of law they administer, even if they are not directly a party. On the other hand, it is difficult to describe the interests of a Government department or public body as in any sense *private*.

15 In certain cases, however, interveners in the private interest may still be found. In *Inntrepreneur Pub Company and others v Crehen* [2006] UKHL 38 for instance, which concerned an apparent conflict between decisions of the European Commission and those of the Court of Appeal, the House of Lords allowed an intervention from the credit card company Visa. While the particular decisions in question concerned anti-competitive behaviour in the domestic beer market, Visa clearly had a vested interested in the broader issue, being engaged in its own battle with the Office of Fair Trading (which had also been granted leave to intervene). In a very different context – an immigration removal decision against the appellant, a Lebanese woman, the House of Lords in *EM (Lebanon) v Secretary of State for the Home Department* granted the appellant's 12-year old son leave to intervene so that representations could be made on his behalf concerning her proposed removal (*EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. For further details of the case and JUSTICE's intervention, see *To Assist the Court* (2009), page 61. While both *Inntrepreneur* and *EM (Lebanon)* undoubtedly raised issues of law of public importance, the respective interventions of Visa and the appellant's son were not concerned with representing the public interest but their own personal stake in the respective outcomes.

16 *A Matter of Public Interest*, p 22. See n.13.

17 See e.g. *R (G) v London Borough of Southwark* [2009] UKHL 26 (Secretary of State for Children, Schools and Families intervening); *Birmingham City Council v Ali and others* [2009] UKHL 36 (Secretary of State for Communities and Local Government intervening); *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56 (Secretary of State for Communities and Local Government intervening*); In re Officer L (Northern Ireland)* [2007] UKHL 36 (Secretary of State for Northern Ireland intervening); *YL (Official Solicitor) v Birmingham City Council and others* [2007] UKHL 27 (Secretary of State for Constitutional Affairs intervening) and *Kay and others v Lambeth* [2006] UKHL 10 (First Secretary of State intervening).

18 See e.g. *Secretary of State for Justice v James* [2009] UKHL 22 (Parole Board intervening); *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 (Information Commissioner intervening); *Yeda Research and Development Company Limited v Rhone-Poulenc Rorer International Holdings Inc and others* [2007] UKHL 43 (Comptroller General of Patents, Designs and Trade Marks intervening); *Riverside Housing Association Limited v White and another* [2007] UKHL 20 (The Housing Corporation intervening); and *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 (Metropolitan Police intervening).

19 See e.g. *Saadi v Italy* (2008) 24 BHRC 123.

Public or private: The Jewish Free School Decision

The Jewish Free School (the **JFS**) case, involved third party interventions from the United Synagogue and the British Humanist Association.[20] The case concerned the admissions policy of the JFS, and its decision to refuse the claimant's admission application on the grounds that his mother's conversion to Judaism was not recognised. The Court of Appeal allowed the appeal, but took what it acknowledged to be 'the unusual course' of requiring the United Synagogue, an intervener, to contribute to the claimant's costs. It found that United Synagogue had effectively taken on the role of the principal party opposing the claim.[21] Its role was best understood as an 'own interest' intervention – where it should, perhaps, have contributed as an interested party, rather than pursuing an intervention in the public interest.

20 *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 626.

21 *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 681, para 4: "*This is because the United Synagogue, by its leading counsel and with the agreement of the other parties, took on the principal role in opposing the claim and seeking to uphold the first-instance decision.*"

Who intervenes?

In 2015, of 79 judgments in the Supreme Court, 38 cases involved one or more interventions by a public body, a civil society organisation or another person or organisation (almost 50% of cases).

Interventions are far from the preserve of interest groups. As the figures show, a significant proportion of interventions permitted by the Supreme Court are brought by public bodies, agencies and Government departments.

For example, between 2009 and 2016, there have been 91 interventions by public bodies and 101 by civil society organisations. Interventions can be pursued by the UK's national human rights institutions, including the Equality and Human Rights Commission and the Children's Commissioner and by international organisations with relevant expertise, such as UN Rapporteurs or the UN High Commissioner for Refugees.

Third party interventions before the UK Supreme Court between 2009 and 2016 [22]

Year	Total cases	Cases with interventions	Number of interventions	Total no of interveners	Interventions by type:		
					Public	NGO	Private
2009	16	6	12	13	6	6	0
2010	52	15	19	21	12	4	3
2011	61	23	44	48	16	22	6
2012	61	22	32	40	15	13	4
2013	76	15	22	24	6	11	5
2014	67	24	36	41	15	11	10
2015	79	38	55	66	23	27	5
2016**	11	4	8	8	2	6	0
Total	423	141	228	261	91	101	41

22 This table has been prepared by JUSTICE, reviewing judgments handed down in each 12 month period. It is accurate to 2 March 2016. National Human Rights Institutions and regulatory bodies are treated as public bodies for the purpose of classification. The Supreme Court holds the most recent figures for applications made and granted in any financial year. In 2013/14, 26 applications were made and all were granted. In 2014/15, the figure was 31 (all granted); and 2015/16, the figure was 33 (all granted).It is far more difficult to assess the figures for intervention in the Court of Appeal given the substantially higher proportion of cases heard in any year. The data on intervention in the Court of Appeal is not routinely collated. In 2007, Sir Henry Brooke, then Vice-President of the Court of Appeal, estimated that there were around 45 interventions in the Court of Appeal in 2005. See Sir Henry Brooke, *Interventions in the Court of Appeal,* (2007) Public Law 401–409, at 403.

The story of intervention in the UK courts

The story of third parties playing a role in litigation didn't begin in 1996.

For instance, the Scots case of ***Sheddan v Knowles*** in 1754 was one of a series of cases in which anti-slavery campaigners became actively involved in litigation in order to further the abolitionist cause. In that case, interested persons supplied 'memorials' on behalf of Sheddan, an escaped slave, that displayed *"a copiousness and variety of curious learning, ingenious reasoning and acute argumentation"*.[23]

Public bodies and international organisations were more readily recognised as interveners by the UK courts. For example, the Equal Opportunities Commission (***EOC***) was first invited to intervene, in 1978, the case of ***Shields v E Coomes (Holdings) Ltd***.[24]

The following year, the House of Lords allowed a joint intervention by the EOC and the Commission for Racial Equality in the case of ***Science Research Council v Nasse***.[25]

By 1988, the UN High Commissioner for Refugees had been granted leave to intervene in the case of ***Sivakumaran***.[26]

However, in 1986 when the Children's Legal Centre applied for leave to intervene in the case of ***Gillick v West Norfolk & Wisbech Area Health Authority***,[27] it was *"brusquely shown the door"* by the House of Lords.[28]

Following the decision in ***Khan***, senior courts have grown incrementally more receptive to the assistance that may be offered by third parties acting in the public interest.

In its last year of operation as the UK's most senior court, the Appeal Committee of House of Lords permitted interventions in almost a third of all the cases where judgment was handed down.[29]

Each year, on average, an intervention can be expected in around 30-40% of all Supreme Court cases.

23 *Sheddan v Knowles* cited in *Somerset v Stewart,* 20 *Howell's State Trials*, cols 1–6, 79–82.

24 [1978] 1 WLR 1408.

25 [1979] 3 WLR 762.

26 [1988] AC 958.

27 [1986] AC 112.

28 Carol Harlow, 'Public Law and Popular Justice', (2002) 65 *Modern Law Review* 1–18 at 7.

29 See JUSTICE, *To Assist the Court* (2009), para 4. Of a total of 75 judgments handed down in 2008, 21 involved one or more third party interventions.

The Human Rights Act 1998 and interventions

Parliament accepted that an increase in public interest interventions was likely, and indeed valuable, after the introduction of the Human Rights Act 1998. Ministers understood that public interest submissions could support the important constitutional role of the House of Lords, and now the Supreme Court, in determining cases under that Act.[30]

The modern intervener

1.15 Public interest interventions have proved their worth for senior judges, particularly in the Supreme Court: "[It is] *the experience of the Court that, not uncommonly, it benefits from hearing from third parties*".[31] Baroness Hale has explained:

> "*Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer […] [F]rom our – or at least my – point of view, provided they stick to the rules, interventions are enormously helpful.*"[32]

1.16 In April 2015, the Criminal Justice and Courts Act 2015 came into force. The Act includes new measures for the treatment of the costs which interveners may face in judicial review challenges in the Administrative Court and in the Court of Appeal in England and Wales.

1.17 The new costs regime is intended to target abuses of process and unreasonable behaviour by interveners not properly able to assist the court or further the public interest.[33] Lord Faulks QC, the Minister in the House of Lords, explained:

> *"[W]ith this clause we hope to deter inappropriate interventions and also to make interveners think about the scale of their intervention so as to reduce the costs for all parties, whether applicants or respondents, and to ensure that those interventions are relevant and genuinely assist the court."*[34]

1.18 We will return later to consider its scope in some detail (see paragraphs 8 and 15). However, while the interpretation of these new measures in England and Wales remains uncertain, many are concerned that they may have a chilling effect on charities and not-for-profit organisations. An undefined costs risk may endanger the financial stability of these organisations or may engage the public responsibilities of their trustees. Further additions to the Civil Procedure Rules (***CPR***) are expected to further define the application of this new statutory framework.

30 HL Deb, 24 November 1997, Col 832. Lord Irvine of Lairg, the then Lord Chancellor explained that existing practice was already evolving to permit the consideration of submissions in the public interest, recognising that this practice reflected the experience of the ECtHR in its approach to the consideration of Convention Rights.

31 Response of the senior judiciary to the Ministry of Justice's consultation paper, *Judicial Review: Proposals for Further Reform*, November 2013, para.37.

32 Baroness Hale, *Who Guards the Guardians?* Public Law Project Conference: Judicial Review Trends and Forecasts (October 2013): http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians. See also Sir Henry Brooke, *Interventions in the Court of Appeal*, [2007] PL 402.

33 These measures were, and remain, controversial. Members of Parliament questioned whether evidence of abuse existed to justify the imposition of new and potentially punitive costs measures. As the senior judiciary explained in their response to the proposals: "*The court is already empowered to impose cost orders against third parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court", Response of the Senior Judiciary to the Consultation on Further Reform to Judicial Review*, November 2013, paras 36–38. See also Thirteenth Report of the Joint Committee on Human Rights 2013–14, para 92.

34 HL Deb, 27 Oct 2014, Col 998. For further information on the scope and interpretation of Part 4, see *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act Part 4,* The Bingham Centre for the Rule of Law, JUSTICE and The Public Law Project, October 2015.

1.19 It would be regrettable if the unintended effects of the new legislation were to deter reasonable and important contributions in the public interest made in order to assist our courts and to make better law. A reasonable intervener acting responsibly and within the bounds of the permission granted by the relevant court or tribunal should, in practice, bear limited risk.

1.20 This Guide is designed to help civil society organisations to better understand the role of that modern, reasonable intervener.

HOW TO USE THIS GUIDE

Layout

Part A of this Guide provides a broad overview of how an organisation should look out for cases in which it may wish to intervene and the issues it should consider when making a decision whether to intervene or not.

Part B provides information on the detailed procedural rules that must be followed in making an intervention. This Part contains not only a general overview of the intervention process, which is intended to be accessible to all decision-makers in an organisation, but also detailed instructions on the process for applying to intervene and drafting submissions that is aimed primarily at solicitors and barristers instructed on a proposed intervention.

Part C offers some concluding remarks, outlining a few key considerations for every reasonable intervener, some key challenges and recommendations for improvements for future practice.

Precedents of the key correspondence and procedural documents that may need to be filed in the course of an intervention are included in the Annexes to this Guide. These are based on the facts of the case study that is detailed below.

CASE STUDY

In order to illustrate the issues an intervener may consider at various stages of an intervention and place them in a 'real world' setting, there are pop-out sections throughout this Guide which apply the issues or rules in the relevant section to a fictional case study.

In the case study, we refer to a fictional statutory framework, for illustrative purposes only.

The basic facts of this case study are as follows:

Peter Timms, the mayor of the city of Greenton, has decided to pedestrianise Greenton town centre for environmental reasons. Janet Jason, the owner of a large department store, shopping mall and car-park in the centre of town, seriously objects to the plan. She issued an application for judicial review of the decision, which was granted by the Administrative Court.

After hearing the case (R (on the application of Jason) v Greenton City Council), the Administrative Court overturned the council's decision to pedestrianise the town centre. Greenton City Council, with their solicitor Elaine Graham, are considering whether to appeal this decision to the Court of Appeal.

A charity, Green Action, would like to intervene in the case. It wants to promote the pedestrianisation of city centres, and it is worried that a court decision in favour of Jason might limit the ability of other city councils to do so in the future. Green Action hopes to assist the court by: (i) introducing statistics on the environmental and public health advantages of pedestrianisation; and (ii) introducing legal arguments based on emerging international jurisprudence on the protection of the environment as a human right. It has instructed a firm of solicitors named Richards and Sons LLP in relation to its proposed intervention.

PART A: CONSIDERING AN INTERVENTION

2. Overview

Purpose of Part A

2.1 The purpose of this Part of *To Assist the Court* is to help anyone working for a charity, public interest or not-for-profit organisation to understand when they might want to consider an intervention in litigation.

2.2 It is designed to address some of the key considerations which a decision to intervene may involve. We hope it will be helpful to staff and board members who encounter or use third party interventions in the public interest as part of their work.

3. When might you think about an intervention?

3.1 The first issue for any would-be public interest intervener must be to ask whether their organisation has anything crucial to say about the case. The all important question is, of course, just how do you think you can assist the court?

3.2 However, deciding as an organisation whether or not to apply to intervene will involve considering a number of related factors:

(a) **Can you add value?** How relevant is your work and experience to the court's consideration of the case? It is important to ask: to what extent do you think your organisation can add value for the court over and above the submissions and evidence the main parties will provide? This is not only a key question that a prospective intervener should ask itself, but will also be the determining criteria applied by the court in deciding whether to grant permission to intervene. See paragraphs 4 and 14.24.

(b) **Should your organisation intervene?** How important is this case likely to be to your charitable objectives, to the goals of your organisation overall, or to your immediate strategy? Is it likely to impact on the users of your services or the people your charity works to support? Is the case likely – regardless of the result – to significantly change an area of law which is important to your organisation's work? Do others have greater expertise?

(c) **What are the risks for your organisation?** In particular, does the positive contribution you can make to the case outweigh the risk that your organisation might be subject to a costs order? Is there any risk that your intervention would result in the case having a worse outcome for your beneficiaries, or a risk that your organisation may be associated with an unwelcome change in law, policy or practice? Are you ready to deal with any publicity associated with the case?

3.3 These are all questions which an organisation should consider before deciding whether or not to proceed and we consider them in more detail below, in turn. These decisions can be informed by staff and by taking legal advice from within and outside the organisation. In cases where there may be a costs risk to the organisation, involvement of senior staff, including at director or chief executive level, the board or trustees may be crucial.

3.4 Taking into account the above factors, the right course may be for an organisation not to intervene in a case, or to seek alternative ways to participate in proceedings (e.g. providing evidence or assistance to a main party to the claim).

To intervene or not

The contribution you can make as an intervener must be kept under review – if the circumstances of the case change, the risk to an organisation may also change and the value you could bring may shift.

For example, as the legal arguments develop during the course of a case, it may become apparent that the issues are already being addressed fully by the main parties or other interveners. In some circumstances, it may be appropriate for an intervening organisation to change its strategy, or even to seek to withdraw its intervention.

Similarly, as a case progresses, and issues become more clearly defined, your experience may become more relevant.

Lawyers, lawyers, lawyers?

A decision to intervene will involve close consideration of the organisation's strategy and expertise, but may also benefit from objective early legal advice from outside the organisation on legal arguments and costs risk. If you are able, you may wish to involve your legal advisers at as early a stage as possible in your decision.

Let us Learn

The Supreme Court considered the impact of the rules on access to student loans on the right to an education in ***Tigere***. The law placed a number of requirements on applicants, including that they be "settled" in the United Kingdom on the day of their application. This rule had been applied to exclude many young people with leave to remain in the UK and educated in the UK from higher education. The claimant in the case had lived and studied in the UK since she was 6 years old and, although she had five unconditional offers to study at UK universities, she was refused a student loan. Just for Kids Law intervened in the case on behalf of the Let us Learn campaign. The charity provided the court with examples of dozens of young people who were also blocked from university education. The campaign was able to bring together these examples from the charity's wider work, highlighting the impact of the policy.[35]

Securing legal advice

While your organisation may have its own in-house legal team, if capacity is limited, a would-be intervener may wish to consider instructing an external legal team with experience to conduct the proposed intervention.

When an intervention is pursued in the public interest, specialist solicitors and barristers may be willing to assist on a pro bono (without charge) basis.

Cases which are important enough to attract an intervener are likely to involve important points of law and principle which may be personally or professionally important to lawyers working in your field.

Many civil society organisations will already have close working relationships with leading lawyers who work in their field. Your in-house legal team, other organisations working in the area and legal directories like Legal 500 or Chambers and Partners may help identify the lawyers who may be willing to work on a pro bono basis.

Larger firms may have more capacity to help, even outside the areas of their own particular expertise. However, specialist and smaller teams also value their pro bono contribution to the wider community and may have a particular interest in the case.

Many firms, like Freshfields, will have a pro bono or a Corporate Social Responsibility (***CSR***) team who may be a good first point of contact for your case.

35 *R (on the application of Tigere (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent)* [2015] UKSC 57. You can read the Just for Kids Law Press Release here: http://www.justforkidslaw.org/category/news-events/press-coverage.

4. Adding value?

4.1 Generally speaking, a case may be appropriate for an intervention if it: (i) raises one or more issues of public importance; and (ii) there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. In short, any would-be public interest intervener must ask how they might assist the court in this case; or how they might 'add value' to the court's consideration of the issues before it.

In the public interest

Supreme Court Rules 26. – (1) After permission to appeal has been granted by the Court or a notice of appeal has been filed, any person and in particular– (a) any official body or non-governmental organization seeking to make submissions in the public interest, […], may apply to the Court for permission to intervene in the appeal.

4.2 The UK courts have taken a broad and entirely pragmatic approach to interventions in the public interest. Although it is an express requirement for intervention in the Supreme Court, it is generally taken to be implicit in applications to intervene in other forums that a third party intervention must generally be made in the public interest to be successful.

4.3 The courts have granted permission to intervene in cases raising issues as diverse as the application of the Human Rights Act 1998 to members of the Armed Forces serving overseas,[36] the treatment of 17 year old children in police custody, the impact of extradition of a parent on the best interests of a child and the application of the right to life in circumstances where a person with mental health problems dies after having submitted voluntarily to the care of the State.[37]

4.4 We consider some of these examples throughout this Part of the Guide, but the public interest is fact-sensitive and defined on a case-by-case basis and according to the particular expertise of the would-be intervener.

The public interest

Rahmatullah Mr Rahmatullah was detained by US forces at Bagram Air Base in Afghanistan, having been transferred to US custody by UK Armed Forces operating in Iraq. He wanted the UK Government to take steps to secure his release and relied upon the common law of *habeas corpus*, which the Government argued did not apply. JUSTICE was granted permission to intervene to make submissions on the comparative understanding of *habeas corpus* in other common law jurisdictions and the implications of the UK Government's interpretation in relation to its international human rights obligations.[38]

36 *Smith & Ors v Ministry of Defence* [2013] UKSC 41.

37 *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2.

38 [2012] UKSC 48.

Children in custody

In 2013, Hughes Cousins-Chang challenged his treatment in police custody. As a 17 year old, he was arrested and held overnight. He had been treated as an adult and denied access to his parents or an appropriate adult, consistent with the guidance in the Police and Criminal Evidence Act Codes of Practice. The Howard League on Penal Reform and the Coram Children's Legal Centre were granted permission to intervene to make legal arguments on the rights of young people in the criminal justice system. In 2011, the Howard League had published research on the impact of these rules on 17 year olds and access to justice generally. The interveners' contribution to the case was recognised in the High Court judgment.[39]

4.5 A prospective third party intervener must address the question of the content of their proposed intervention – reasonable interveners cannot simply duplicate the parties' submissions.

4.6 An application for permission to intervene is likely to be refused unless the applicant can show their submissions would provide the court with information, evidence or submissions on the state of the law that they would not otherwise obtain. This contribution may take a variety of forms, depending on the nature of the case at hand and the particular organisation intervening: a grassroots organisation, for instance, is likely to be well-equiped to gather evidence concerning the direct impact of proposed measures; a policy organisation may be better placed to provide submissions on policy aims and legislative history; an organisation with international expertise may be able to assist with comparative law, and so forth. However, it is exceptionally important for would-be interveners to remain focused on assisting the court with the issues at hand.

39 *The Queen on the Application of HC (a child, by his litigation friend CC) -v- The Secretary of State for the Home Department and Others* [2013] EWHC 982 (Admin). You can read the press release issued by the Howard League responding to the judgment here: http://www.howardleague.org/17-year-olds-in-police-custody0.

Shaping an intervention

The earliest consideration for any would-be intervener is what their contribution might be and how it might add value to a case. There are no hard and fast rules on what contribution might serve the public interest:

(a) ***The bigger picture?*** Does your organisation have practical experience or evidence which might help the court determine an issue before it? Would it be helpful for the court to have a greater understanding of the implications of its ruling on the law or practice? Can you provide helpful context from your work? Is this something that you could provide in evidence from your staff or another expert in a witness statement?

(b) ***Comparative practice?*** Other countries may have experience of the problem before the court, which may help inform the outcome in this case. Does your organisation have experience of good practice or the development of the law in other countries?

Do you have something to say about how any comparative material should influence the development of the law in this case? You may wish to consider instructing counsel to make legal submissions on your behalf on any comparative practice that may be relevant to the court's decision.

(c) ***International law?*** Are there international law standards which are relevant to the case? Does your organisation have particular experience or expertise on the application of those standards?

(d) ***Legal expertise?*** Does your organisation have particular legal expertise which will make your submissions on the interpretation of the law valuable to the court in deciding the issues in the case? Does that expertise mean that you can make an important legal argument not likely to be raised by the parties, but that is relevant to the public interest?

The Public Interest

In ***Nunn***, the Supreme Court was invited to consider the rules on access to material for the purposes of challenging a conviction. JUSTICE has a long history of working on miscarriages of justice. JUSTICE, the Innocence Network UK and the Criminal Appeal Lawyers Association were granted permission to intervene to make submissions on the impact of the very narrow disclosure obligation adopted by the Divisional Court on the investigation of miscarriages of justice. All three organisations submitted information drawn from their historical work on miscarriages of justice uncovered by the investigations of lawyers, journalists and others.[40]

In ***Hotak & Kanu*** the Supreme Court were asked to consider the meaning of "vulnerability" in interpretation provisions on priority need for assistance under the Housing Act 1996. The claimants successfully argued that the interpretation applied by local authorities set the bar too high, was inconsistent with the intention of Parliament and operated to the detriment of the rights of many vulnerable people. The Equality and Human Rights Commission, Shelter and Crisis and the Secretary of State for Communities and Local Government were granted permission to intervene.

Shelter and Crisis, represented by a leading local authority lawyer, persuasively argued that the problem had a far wider impact beyond the claimants in the case.[41]

In ***HH & PH,*** the Supreme Court considered how the impact of the extradition of a parent on children should affect the decision to extradite an individual. The court heard interventions by JUSTICE, the Coram Children's Legal Centre and the Official Solicitor. JUSTICE's submissions focused on the rights of the child in international law, including in the UN Convention on the Rights of the Child. The court noted the value of all three interventions.[42]

40 *Nunn v Chief Constable of Suffolk Constabulary* [2014] UKSC 37. You can read the submissions of the interveners here: http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Interveners-case-in-Nunn.pdf.

41 *Hotak v Southwark LBC, Kanu v Southwark LBC, Johnson v Solihull MBC* [2015] UKSC 30.

42 *HH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); PH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); F-K (FC) (Appellant) v Polish Judicial Authority (Respondent)* [2012] UKSC 25.

5. Identifying cases

5.1 Although it may be in the public interest and the interests of justice that the courts receive third party interventions in appropriate cases, the question of which cases are appropriate for an intervention is not always straightforward.

5.2 One of the central difficulties faced by NGOs lies in determining whether a case is suitable for intervention. For a prospective intervener, the question of whether to intervene in any particular case depends, first of all, on knowing of its existence and the issues which it raises. The majority of organisations have no in-house legal expertise nor ready access to it on a regular basis. However, even organisations such as JUSTICE that are staffed by lawyers and are regular interveners before the courts find it difficult to identify suitable cases, relying on a combination of reported cases, media reports and word-of-mouth.[43]

All in the timing?

JUSTICE has historically intervened in a number of cases about the application of the Human Rights Act 1998 and its scope outside of application to UK activities outside of the UK. In late December 2013, JUSTICE was alerted to an expedited hearing in the Supreme Court in the case of ***Smith v Ministry of Defence*** to be heard in February 2014 by a barrister member of the organisation. Without such a speedy warning, JUSTICE would have been unable to pursue a prompt application and, as was ultimately the case, a successful intervention.[44]

5.3 In ***To Assist the Court*** (2009), we noted the difficulty of identifying cases which do raise public interest issues, both in the UK and at the ECtHR. For a number of years, both JUSTICE and the Public Law Project have sought to promote a publicly available register of pending judicial review claims in the Administrative Court. This kind of register could be valuable in each of the jurisdictions of the United Kingdom This register would provide a short description of the case, the contact details for the parties (where represented) and highlight any key public or human rights grounds raised in the case.

43 Michael Fordham QC, *'Public interest' intervention: a practitioner's perspective'* [2007] *Public Law* 410-413 at 410. 1.1 As Michael Fordham QC – who frequently represents interveners – has noted: "*A major problem is that those who might have intervened do not find out about the case until too late. It is common for NGOs to face a last-minute scramble to try and get permission when the timing makes them least popular: the timetable and time-estimate are fixed by the parties, and the injection of materials and submissions presents practical difficulties.*"

44 [2013] UKSC 41. You can read more about JUSTICE's submissions in that case here: http://justice.org.uk/smith-others-v-ministry-defence/.

5.4 While the Supreme Court now provides a very helpful register of upcoming cases which comprises similar material in an accessible online format, this information is often only published in the weeks immediately before a case is due to be heard.[45] This limits the value of such information to would-be interveners as an application to intervene must be made promptly and therefore usually at a stage before these details are available online.

5.5 At the ECtHR, while significant improvements have been made in increasing the accessibility of information published on the court website, it remains the case that careful monitoring may be necessary to ensure that an application for permission to intervene is made quickly enough. Applications will only be considered in the 12 week period after a case is 'communicated' to the United Kingdom or any other State respondent. Although all communicated cases are published on the court's website, these can be difficult to find unless the case has already been subject to some publicity.

5.6 In 2009, JUSTICE highlighted a particular problem affecting cases where the UK Government – or another State party – acts as an intervener. Such cases are likely to identify issues of particular importance and specific publicity might be warranted. For example, there might be a responsibility on the UK Government, either through the Secretary of State for Foreign and Commonwealth Affairs or the Lord Chancellor, to report any proposed intervention by the United Kingdom Government to the Joint Committee on Human Rights. The intervention would then be subject to scrutiny by the Joint Committee.

All in the timing?

In 2005, the UK Government famously intervened in the case of ***Ramzy v Netherlands*** before the Grand Chamber to invite the court to overturn its previous ruling in ***Chahal v United Kingdom*** which had restricted the ability of ECHR States to return individuals to countries where they face a real risk of torture.[46]

A number of NGOs including JUSTICE, Liberty, the AIRE Centre, Amnesty International and Human Rights Watch were granted permission to intervene in support of the ***Chahal*** ruling. The ***Ramzy*** case stalled and was not heard.

In the meantime, the UK Government quietly applied to intervene in ***Saadi v Italy*** before the Grand Chamber which raised the same issues. However, it was not until well after the deadline had passed for interventions that the NGO interveners in ***Ramzy*** learned about the UK's position in ***Saadi***. The lone submission from the UK, voiced by the Government, urged the court to water down the protection offered by the court for victims of torture.

Although the Grand Chamber ultimately refused to overturn its previous decision in ***Chahal***,[47] this example highlights the importance of increased transparency in State interventions before the Strasbourg court.

45 See https://www.supremecourt.uk/current-cases/index.html

46 This step was proposed by the Prime Minister in his infamous 'rules of the game' speech following the 7/7 bombings: see Prime Minister's Press Conference, 5 August 2005: '*Now in respect of British Courts we can retest [the Chahal ruling] and, if necessary, we can amend the Human Rights Act and that covers the British courts' interpretation of the law. There is then, of course, the possibility that there is an appeal to the European Court*'. Two months later, the Government announced that it would be intervening in *Ramzy v Netherlands*: see e.g. 'Ministers seek to overturn torture rule in deportation', *The Guardian*, 3 October 2005.

47 *Saadi v Italy* (2008) 24 BHRC 123.

Finding the cases that matter

Key sources of current awareness will vary from issue to issue, but there are some shared sources of information which might increase the capacity of an organisation to identify cases where an intervention might serve the public interest. For example:

(a) journals and the press may pick up on cases with a public interest element. However, such reporting may be at too late a stage to allow for a considered application to intervene;

(b) online commentary and social media reports from legal practitioners in your field may be more valuable in highlighting upcoming legal challenges with a public interest element. For example, cases on a particular issue can be tracked through online tools like Google Alerts; and

(c) contacts with specialist legal organisations can help highlight issues where a specialist intervention may assist the court. For example, the Housing Law Practitioners Association and the Immigration Law Practitioners Association are active in monitoring developments in the law as and when they arise; they and their members have been involved in a number of crucial interventions in the public interest.

Finding out more?

Even when you've identified a case you may be interested in, you may need more information to understand if you can really help. This information will be provided in the court papers, which are part of the public record once filed. These papers – a claim and a defence; grounds for appeal and a reply, for example – will help you and your legal team understand the claim and whether an intervention would be in the public interest. The easiest and quickest way to get a copy is often to ask the solicitors in the case, explaining your interest.

6. Invitations to intervene

6.1 Traditionally, the courts have rarely solicited interventions.[48] However, in recent years, and in a number of cases, the court has sought to invite an intervention by a party with an interest or relevant expertise in an issue before the court. For example, in ***Rogers v Merthyr Tydfil County Borough Council***, a case involving a playground injury, the Court of Appeal heard evidence to suggest that the case in fact concerned the broader interests of the insurance market. This led to the court inviting a range of insurers and others to intervene.[49]

48 As Lord Hope has said: '*it is not the function of the court to invite interested parties to intervene. It is up to interested parties to take the initiative*'. Quoted in Andrea Loux, 'Writing Wrongs: Third Party Interventions Post-Incorporation' in Boyle, Loux and others (eds), *Human Rights and Scots Law* (Hart Publishing: 2002) at 335.

49 [2006] EWCA Civ 1134 at para 10.

6.2 In 2009, JUSTICE raised some concern that there was no mechanism or guidance available to judges to help them in cases where they sought to solicit an intervention in the public interest. Importantly, in many cases it may be difficult to identify the appropriate body with the right expertise. While an open invitation may be fair, it may also open the court to a flood of applications. Equally, however, the court may wish to be wary of a reliance on the "usual suspects" as a source of reliable assistance.

6.3 During the passage of the Criminal Justice and Courts Act 2015, the Government accepted the ability of the courts to invite an intervention in the public interest. Importantly, Ministers indicated that the new mandatory costs framework would not apply to interveners who were invited to intervene in a case.[50] Against this background, guidance to judges on the management of invitations to intervene could be helpful and constructive. In the absence of such guidance, parties to litigation and would-be interveners may wish to be alive to the prospect of an invitation by the court, although such invitations may continue to be rare.

7. When to intervene

7.1 A crucial part of any decision to intervene will include consideration of whether an intervention will be timely. This assessment will involve consideration of a whole range of factors, including the kind of intervention proposed and when it might be most useful.

For example, an intervention may have a different impact at different stages in a claim and various courts and tribunals will apply distinct rules on procedure and may attract a different costs risk.

7.2 Relevant considerations, beyond the immediate capacity and resources of the intervener, may include the following:

(a) factual arguments are likely to be most relevant to an intervention at an early stage. However, courts and tribunals may be reluctant to accede to an intervention at this stage, when the issues between the parties may be less defined. On the other hand, if the material which an intervener wishes to produce will be relevant to the assessment of facts, this may encourage a decision to get involved early;

(b) costs rules may differ across tribunals (as explained above, there is a presumption that costs will not be awarded against an intervener in the Supreme Court); and

(c) while a decision from a higher court will have a greater impact, not every case is destined for the Supreme Court. A would-be intervener may wish to consider whether an early intervention might help ensure that a matter is resolved with a helpful outcome before a contradictory decision of a lower court or tribunal becomes settled law.

50 *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act Part 4,* The Bingham Centre for the Rule of Law, JUSTICE and The Public Law Project, October 2015, page 33 et seq.

Intervening early

Although interventions are most common in the higher courts, intervention is possible and can be helpful in a range of courts and tribunals. During the course of the 7/7 inquest, JUSTICE, INQUEST and Liberty were granted permission to intervene in a judicial review of the coroner's decision on how much of the inquest could take place in secret. Part of this contribution was the provision of a witness statement which set out in detail, based on points of principle and experience, why the closing of inquest hearings would be inconsistent with the UK's commitments in international and domestic law and how closed consideration would impact on bereaved families. This contribution was particularly important bearing in mind the existing power to hold part of the proceedings *in camera* (but without excluding family members of those who died).[51]

Getting involved in litigation

There are many different ways in which a third party might play a part in legal proceedings:

(a) informally providing legal arguments or factual information to one or more of the existing parties;

(b) offering a formal witness statement or expert witness statement to one of the existing parties;

(c) intervening as a third party to provide either written legal submissions, or a witness statement, or both; or

(d) intervening as a third party (as above), to put ***both*** written and oral representations before the court.

Providing support to a party through the provision of expertise or evidence instead of pursuing an intervention may reduce the impact on an organisation. This approach can be less resource intensive and means that the parties continue to bear the burden of any costs risk, however limited.

However, these more limited contributions can only support the submission of one side or the other and how they are used remain within the control of that party, not the would-be intervener.

51 *R (on the application of) the Secretary of State for the Home Department and The Security Service v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin).

8. Costs, resources and risks

8.1 Many public interest organisations, including charities, community groups and not-for-profit organisations, have very limited resources. While an intervention may benefit the public interest, the value of the intervention must be considered against any potential risks to the organisation.

8.2 The costs rules associated with an intervention will vary depending on the court or tribunal involved. There is no cost in pursuing an intervention before the ECtHR, for example.

8.3 Historically, there has been a strong presumption that all parties bear their own costs in relation to an intervention and that no order would be made against a public interest intervener. This broad approach is grounded in the public benefit offered to the court by a public interest intervention, and is reflected in the Supreme Court Rules.

Costs and resources

Much attention has been paid to the relatively rare occasions where an intervener may be ordered to pay the costs incurred by other parties in connection with the intervener's involvement. In planning an intervention, any would-be intervener should also be aware their own costs. These will, of course, include staff time allocated for the management and conduct of the case. In a small organisation, such costs could have a considerable impact, and assessment of the resources required for an intervention will be an important factor in deciding whether or not to proceed.

8.4 However, it has always been the case that costs could, in theory, be ordered against an intervener who:

(a) behaved unreasonably, or

(b) had in effect taken on a role as one of the main parties to the dispute.

8.5 The JFS case is a rare example of a case where an intervener, the United Synagogue, effectively ran the defence (see above).[52] However, most public interest interveners have generally taken the view that, with proper conduct, the risk of adverse costs order against a reasonable intervener acting in the public interest is very low.

52 See para 1.14 above.

A brave new world of costs risk?

On 13 April 2015, provisions of the Criminal Justice and Courts Act 2015 (the ***Act***) came into force, introducing new rules which may affect the costs exposure faced by third party interveners in some proceedings going forward.

The new rules do not prevent interventions in judicial review proceedings in the High Court or Court of Appeal. However, they do underline the need for careful management of interventions.

Under the Act, a costs order must be made, other than in "exceptional circumstances" when an order would be "inappropriate", in any case where:

(a) an intervener has behaved unreasonably, or

(b) has in effect taken on a role as one of the main parties to the dispute; or

(c) an intervention is not of significant assistance to the court, or

(d) relates in significant part to matters which are not necessary for the court to consider.

What will count as "exceptional" or "inappropriate" will turn on the specific facts of the case. It could be argued, for example, that it would be "inappropriate" to sanction an intervener whose submissions or evidence, through no fault of the intervener, became academic to the case after permission to intervene was granted.

New court rules may provide further guidance, but are not yet available.

This new mandatory costs framework will only apply in England and Wales:

(a) to judicial review proceedings (including appeals from such proceedings). Therefore the "old rules" continue to apply in other cases and their appeals (for example, possession proceedings, tort claims, asylum claims, human rights claims under s.7 HRA, and, probably, "judicial review" claims brought in the Upper Tribunal);

(b) in the High Court and Court of Appeal. There is therefore no change in the costs position in other forums (including the tribunal system and the Supreme Court); and

(c) to judicial review proceedings where the claim form was filed on or after 13 April 2015. The new provisions probably only apply to appeals where the underlying judicial review proceedings were commenced on or after 13 April 2015.

8.6 In any event, in any case where there may be some readily identifiable costs risk, including under the new statutory framework, there are prudent steps which reasonable interveners can take to limit their exposure, including:

(a) seeking undertakings from the main parties;

(b) seeking costs protection from the court by asking for a prospective order on costs;

(c) being as clear and full as possible in the application to intervene in setting out the proposed scope of the intervention;

(d) sticking to the scope of any permission to intervene (or asking the court to vary that permission if necessary as the case evolves); and

(e) displaying exemplary conduct towards the other parties and towards the court (for example, observing all relevant deadlines and other court rules, ensuring proper service on all parties, etc.).

We consider these options in more detail in Part B.

8.7 Costs risks need not be determinative. In many tribunals, it is very unlikely that an intervener will be asked to pay anything other than its own costs, including the Supreme Court in the UK and the ECtHR. It is essential that you discuss costs with your legal advisers on a case-by-case basis and understand the particular risks in the case in which an intervention is being considered. We consider the detailed costs position in a range of tribunals and jurisdictions below (Part B).

The impact of costs risk

In the ***S and Marper*** case, which considered the legality of retaining the DNA and fingerprints of innocent adults and children arrested but not convicted, Liberty was granted permission to intervene in the domestic courts but withdrew after a threat from Government lawyers to pursue costs against them. The domestic courts held that Article 8 ECHR did not prevent the blanket retention of DNA and fingerprints. When the case was considered by the Grand Chamber of the ECtHR, that court disagreed. It found that the UK law was plainly disproportionate and in violation of the right to respect for private life. Liberty had successfully intervened during the litigation in Strasbourg, safe from costs risk.

The lessons to be learned from this episode are many. Had the Law Lords had the benefit of Liberty's contribution, would the domestic judgment have been different? Was the public good served by the threat to pursue costs in a case of such obvious public interest? Thankfully, Liberty were not deterred from offering their expertise at a later stage in the case when costs risks were not in play.[53]

53 *R v Chief Constable of South Yorkshire Police ex parte Marper* [2004] UKHL 39 at [17]. See also *S & Marper v United Kingdom* App Nos 30562/04 and 30566/04.

8.8 However, while costs risks will be an important factor for any would-be intervener to consider, the degree of risk may be limited in any reasonable intervention, designed to assist the court and further the public interest and conducted responsibly.

Managing publicity?

Many of the cases involving interventions are not only important for the public interest, but also attract wide public interest and attention. In deciding to pursue an intervention, it will be important for an organisation to consider how it might deal with publicity surrounding a case. This might involve devising an early press strategy, preparing press statements and preparing senior staff or trustees for interviews.

9. Joint interventions

9.1 Where a number of different organisations are interested in intervening in a case, they may want to consider a joint intervention. Although joint interveners may have different interests in a case and may bring different experience to bear, often a shared approach can be agreed. If common ground exists, the advantages of joint interventions are several:

(a) the expertise and experience of different organisations will be combined into a single submission, reducing the burden of multiple interventions on the court;

(b) bringing together different types of expertise into a single intervention may strengthen its contribution to a case;

(c) working together can reduce the burden on each organisation intervening; and

(d) a joint intervention can carry a particular weight when a broad-based coalition of different organisations support a single submission.

Working together: Joint interventions

In ***Rabone***, the Supreme Court was asked to consider the scope of the duties of public health services to protect the right to life of someone admitted voluntarily to the care of mental health services (the operational duty under Article 2 ECHR). The claimants were the family of a young woman who committed suicide after being released from the care of her doctors.

INQUEST, JUSTICE, Liberty and Mind intervened jointly and made submissions on the extent of the UK's obligations in human rights law to patients and on the wider impact of the decision to exclude some vulnerable people from the scope of the Convention's protection.[54]

Amnesty International, JUSTICE, the International Commission of Jurists in Geneva and REDRESS are intervening in the case of ***Belhaj & Ors v Straw & Ors***. This case involves a claim for redress in connection with alleged UK involvement in, or support for, the rendition and torture of the claimants by US actors. In a case with significant global implications for redress for violations of international human rights standards, the NGO interveners are bringing shared experiences in UK and international human rights law and redress for torture victims to the proceedings. Written and oral submissions have focused on the scope and implications of barriers to access to justice in the common law, both in the UK and in comparative practice, and the relationship between domestic common law rules and international obligations which prohibit torture and support redress for victims.[55]

54 *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2.

55 UKSC 2014/0264 (Judgment pending).

9.2 However, joint interventions involve their own particular management issues. Achieving such a consensus is not always straightforward. It is important for potential joint interveners to discuss their policy positions on the case early, and, in so far as possible, agree a shared strategy for the intervention. The larger the coalition, the greater the weight of authority it may carry. However, in larger groups there may be a greater space for disagreement on substance and strategy, and a greater need for co-ordination and compromise. Joint interventions can be more time consuming to co-ordinate and must take into account the different management structures and working practices of each organisation from the outset. Your organisation may have a very simple process for agreeing a policy position, while another intervener may have more formal processes. Will they take longer to sign-off the final submission? Will this change your timeline?

9.3 Joint interventions may give rise to case management considerations which are easy to overlook. For example, if you have instructed a solicitor to run the case, how will you give instructions? If you have a substantial disagreement or a conflict, how will the conflict be resolved?

Working well together

It may help if at the outset any joint interveners agree in writing what the decision-making process will be, including a list of key contacts from whom instructions can be taken from each party and what will happen if agreement is not possible.

Working with other interveners

In key cases, there may be multiple different interventions, including by different groups of interveners.

Where there is a high degree of interest in a case, this may affect your own assessment of whether your organisation can add value.

When working with multiple distinct interventions, it will be helpful to identify the contribution you wish to make and to coordinate with the other interveners to try to avoid duplication, if possible.

An intervener's contribution should not be shaped or framed by the interests of others and interveners should guard their independence.

However, the court will appreciate efforts made by interveners to ensure that their contribution is limited to that which may truly assist the court, avoiding unnecessary duplication with the parties or other interveners.

Such active, but considered, case management and planning may be even more important where the new statutory costs rules apply.

In ***Belhaj*** (above), the NGO interveners were granted permission alongside a separate intervention from the UN Special Rapporteur on Torture and the Chair Rapporteur of the UN Working Group on Arbitrary Detention. Both groups of interveners were careful to coordinate to avoid duplication of material before the Court of Appeal and again in the Supreme Court.

Multiple Interveners

When the High Court was asked to consider the claim of David Miranda that his detention and the search and seizure of his possessions under Schedule 7 of the Terrorism Act 2000, in connection with the Snowden revelations, was in violation of the Human Rights Act 1998, a significant number of organisations were granted permission to intervene. There were three groups bringing distinct interventions. Liberty intervened in its own right. Article 19, English PEN and the Media Legal Defence Initiative intervened jointly. A third broad coalition of organisations joined forces as "a coalition of media and free speech organisations".[56]

Working with others, adding value

Where there are multiple interveners the value that an additional intervention will add to a case may take special consideration. In ***Burke*** – a case involving NHS guidance on the removal of life-prolonging treatment – the Court of Appeal heard from nine separate interveners. It urged caution in future cases:

"We have referred to matters put before us by three interveners...We mean no discourtesy to the other interveners when we observe that a great deal of their thoughtful and well-presented contributions fall victim to our general view that this litigation expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case." [57]

56 *Miranda v Secretary of State for the Home Department & Ors* [2014] EWHC 255 (Admin) (19 February 2014).

57 *R (Burke) v General Medical Council* [2005] EWCA Civ 1003. The High Court judgment involved a very wide-ranging consideration of the nature of autonomy and the application of Article 8 ECHR, an important and controversial question which triggered the interest of a wide range of civil society organisations. The Court of Appeal approached its consideration of the issues in dispute on a far narrower basis.

10. Maintaining neutrality

10.1 Although the basis of third party interventions is to assist the court with submissions on the public interest, rather than simply to support one or other of the parties, this distinction is sometimes lost on the parties themselves. Whatever the intervener's intent, it is very likely that its submissions will give more support to one party than the other, and, for that reason, lawyers for one of the main parties may be keen to discuss strategy with interveners and co-ordinate legal submissions.

10.2 This imbalance can place interveners in a difficult position. It is important to maintain independence as a third party, but it is equally important to ensure that its submissions do not simply duplicate submissions that will anyway be before the court.

10.3 Some contact and co-ordination with both parties is therefore essential, not only to avoid duplication at the outset, but also to stay abreast of the way the case is developing to ensure an overlap does not develop. Awareness of the development of the dispute between the parties will be crucial and may grow more significant in cases where the new costs rules may apply (see Section 4, below).

10.4 The need for neutrality as an intervener will play an important role in the day to day management of your involvement in any case, but it should also inform your publicity, press involvement and communications with the outside world about the case and your role in it.

11. Working with your lawyers

11.1 In public interest interventions, it is important that the intervener works collaboratively with their legal team from the outset. The main purpose of an intervention in the public interest is to assist the court by placing the expertise and knowledge of the intervener at its disposal, in so far as it can add value to a claim.

11.2 In this way, the intervener may have a greater interest in shaping the substance of its contribution from the outset than a lay client may have in an ordinary claim.

11.3 An intervention on a discrete point may have a wider impact on the work of an organisation, or might be informed by earlier research or outreach work by the organisation. Coordination from an early stage may ensure that an intervention is designed in a way which maximises the value to the court and ensures the greatest impact for the intervener.

An integrated approach to intervention?

JUSTICE was granted permission to intervene in the case of ***Cadder*** at the Supreme Court. This was an historically important case, which we consider in more detail below at paragraph 17.4. It involved the right to legal advice in police detention in Scotland.

JUSTICE's submissions focused on the international obligations of the UK on the right to access a lawyer, including as protected by the EU procedural rights framework. JUSTICE's Director of Criminal Justice had worked on the development of this law as part of a wider programme of work on law reform. She was able to act as junior counsel in the case, relying on her own knowledge and experience of the law and JUSTICE's wider policy work in the area. After the decision of the Supreme Court prompted new legislation in Scotland, JUSTICE was well equipped to help members of the Scottish Parliament understand the importance of the proposed changes. It now works to train lawyers and police officers on the implementation of the new legal framework.

Integrating in-house legal expertise into the preparation of an intervention is only one way to ensure that a public interest intervener maintains control of an intervention and that the submissions made on its behalf are consistent with the policy aims and priorities of the organisation and its wider work. Early and frequent contact between the legal team working on the intervention and policy staff can help maximise the contribution which a public interest intervener can make and ensure that their intervention sits well alongside the other commitments of the organisation.

PART B: MAKING AN INTERVENTION

12. Overview

12.1 The sections in this Part B (Section 1 '*Applying to Intervene*' and Section 2 '*Managing and Drafting the Intervention'*) are aimed primarily at solicitors and barristers instructed on a proposed intervention and contain detailed instructions on the process for applying to intervene and drafting submissions.

12.2 There are rules and nuances of procedure that vary between different kinds of courts and tribunals. Senior decision-makers within an organisation do not necessarily need to have a full understanding of these nuances in order to form a decision on whether to intervene. However, it can be helpful to grasp the key steps common to interventions in any UK proceedings, which are set out in the flowchart overleaf.

INTERVENTIONS STEP BY STEP

Intervener makes decision to intervene.

Optional: Intervener makes written submissions to the court in support of the relevant party's application for permission for judicial review/to appeal (depending on the stage in proceedings).

Intervener drafts the application to intervene. This will include information about the intervener, the reason for its intervention, the desired form of the intervention and a request for the court to make an Order on costs.

Intervener requests consent to its proposed intervention from the parties to the case (enclosing, if available, a draft of the application).

Intervener files its application to intervene with the court and serves it on the other parties.

The court considers the application to intervene on the papers. If successful, it will make an Order setting out the permitted form of intervention and the relevant deadlines.

Intervener files its written submissions with the court and serves them on the other parties.

The court hears the case. Counsel for the intervener should attend the hearing, making oral submissions (if permission to do so has been granted) or to answer any questions the court may have regarding its written submissions.

Optional: In its written intervention or oral submissions to the court, the intervener (or any of the other parties) may request that the UK court makes a preliminary reference to the Court of Justice of the European Union (***CJEU***) to determine a point of EU law.

If the UK court decides to make an order for reference, the intervener (or any of the other parties) may make submissions to the CJEU. Once the CJEU issues its binding judgment on the case, the case is then referred back to the UK court to apply the CJEU's finding and hand down the final judgment.

The court hands down judgment in the case.

Optional: If there is an application for permission to appeal the judgment, the intervener may file written submissions with the court in support.

If permission to appeal is granted and the intervener wishes to intervene in the higher court, it should write to the court stating its intention to do so (or, in the Supreme Court, re-apply for permission to intervene).

It may be possible for one of the parties in the case to make an application to the European Court of Human Rights (***ECtHR***). An intervention may also be possible at this stage.

SECTION 1: APPLYING TO INTERVENE

13. Introduction

13.1 In order to make submissions of any kind as an intervener in any forum, it is first necessary to apply to the relevant court or tribunal for permission to intervene. The detailed procedural rules for doing so differ slightly depending on the court and the jurisdiction, but the same broad framework for practice applies throughout.

13.2 The first part of this section deals with the following considerations, common to most domestic proceedings in England and Wales, and in the Supreme Court and the Privy Council:

(a) how to make an application to intervene (including the need to seek the consent of the main parties to the case, which documents are needed for an application to intervene, and how to draft them);

(b) when to make an application to intervene; and

(c) costs considerations.

13.13 We consider the particular procedural rules which apply in Northern Ireland and Scotland separately in paragraphs 16 and 17. The rules for interventions in the European Court of Human Rights and the Court of Justice of the European Union are different, and are considered separately in the second part of this chapter at paragraphs 18 and 19.

14. Making an application to intervene

Who may intervene and in which court?

14.1 In civil and judicial review proceedings in the High Court, the Court of Appeal in England and Wales,[58] any First-tier Tribunal[59] or the Upper Tribunal[60] any person may apply for permission to file evidence or make representations at the hearing.

14.2 Interventions in judicial review proceedings are explicitly provided for in the Administrative Court (under CPR 54A) and the Upper Tribunal (under Rule 33 of the Upper Tribunal Rules). Although there is no formal route for applications to intervene in judicial review proceedings in the Court of Appeal, such interventions are common.

14.3 There is no formal requirement for an intervener to seek permission to intervene in judicial review proceedings before the Court of Appeal if the intervener was previously granted permission to intervene in the case before the Administrative Court. However, as a matter of practice in such circumstances the intervener should write to the Registry of the Court of Appeal stating that it intends to continue its intervention and request formal permission to do so.

14.4 Interventions are less common in civil claims heard in the High Court, Court of Appeal or one of the First-tier Tribunals, and there is no formal basis for applications to intervene in this kind of case. However, they do still occur.

58 PD 54A paragraph 13.3.

59 The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules, Rule 5(3)(d); The Tribunal Procedure (First–tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008, Rule 5(3)(d); The Tribunal Procedure (First-tier Tribunal) (Health, Education And Social Care Chamber) Rules 2008, Rule 5(3)(d); The Tribunal Procedure (First–tier Tribunal) (Tax Chamber) Rules 2009, Rule 5(3)(d); The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, Rule 5(3)(d); The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 4(3)(d); The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, Rule 6(3)(d).

60 Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 33.

Secret evidence

In 2009, JUSTICE and Liberty intervened in ***Al Rawi & ors. v The Security Service & Ors***.[61] in the High Court, making submissions on whether a court could adopt a 'closed material' disclosure procedure in a civil claim for damages relating to the claimants' detention in Guantanamo Bay.

Both organisations intervened in each stage of the case to the Supreme Court, which held that the common law could not create a closed material procedure without statutory foundation. This work informed the response of JUSTICE and Liberty to the Government's introduction of closed material procedures for civil proceedings during the passage of the Justice and Security Act 2013.

Both organisations continue to work on the impact of these closed procedures on the principle of open justice.

Assisting the Tribunal?

In 2014, the Human Dignity Trust (***HDT***) appealed against a decision by the Charities Commission to refuse its registration as a charity. JUSTICE and REDRESS were jointly granted permission to intervene by the First-tier Tribunal (Charity). The interveners had sought to make legal submissions on the interpretation of the charitable objectives of civil society organisations working on human rights issues consistent with the provisions of the Charities Act 2006 and 2011. Permission was granted by the Tribunal on a very limited basis, focusing only on those organisations' experience of performing similar functions to those performed by HDT. In considering an early intervention, a court or tribunal may be very conscious of proportionality and the need to limit their determination to those facts and legal issues which are strictly necessary to determine the claim.

14.5 The Employment Tribunal rules expressly allow "*any person*" to participate in proceedings.[62] However, interventions in this forum are somewhat circumscribed. A would-be intervener must demonstrate a "*legitimate interest*", which is likely to involve a direct financial interest in the proceedings.[63]

14.6 The Criminal Procedure Rules do not specifically provide for interventions in criminal proceedings. However, there have been instances of interventions in the Court of Appeal (Criminal Division) on grounds similar to those employed in judicial review proceedings.

14.7 An intervener should write to the clerk of the Lord Chief Justice seeking permission to intervene. The letter should cover the same ground as an application in a civil matter.

61 *Al Rawi & ors. v The Security Service & Ors.* [2009] EWHC 2959 (QB).

62 Employment Tribunals (constitution and Rules of Procedure) Regulations 2013/1237, Schedule 1(35).

63 Employment Tribunal Presidential Guidance – General Case Management Powers (Amendment to the Claim and Response Including Adding and Removing Parties), para 13.

Interventions in Criminal Appeals

The Office of the Children's Commissioner for England, intervened in criminal appeals by victims of trafficking, several of whom were said to be children, who were each prosecuted and convicted of criminal offences. The Children's Commissioner made submissions concerning the way children should be dealt with in such circumstances, including in relation to age assessment (if their age is in dispute), to ensure that their best interests are sufficiently taken into account. All the appeals were allowed.

The application was made by letter to the Lord Chief Justice, with identical content to an application for permission to intervene in the Civil Division, including a summary of the proposed intervention. Permission was granted with mutual costs protection in respect of the intervention.[64]

The Supreme Court and the Judicial Committee of the Privy Council

The Supreme Court Rules make express provision for third party interventions and are supported by various Supreme Court Practice Directions.[65] The Supreme Court Rules provide that any person can make applications to intervene in any kind of appeal before the UK Supreme Court, and notes that "***in particular***" any of the following may apply:

(a) any official body or NGO seeking to make submissions in the public interest;

(b) any person with an interest in proceedings by way of judicial review; or

(c) any person who was an intervener in the court below or whose submissions were taken into account in the application to the Supreme Court for leave to appeal.[66]

Therefore, an organisation that intervened at an earlier stage of proceedings is required to re-apply to the Supreme Court, although it is entitled to be notified of any application for permission to appeal made by any of the main parties in the court below.

In Privy Council cases, any person claiming to have an interest in an appeal may apply for permission to intervene in an appeal.[67]

64 *(1) L (2) HVN (3) THN (4) T* [2013] EWCA Crim 991.

65 Supreme Court Practice Direction 3 "Applications for Permission to Appeal"; Supreme Court Practice Direction 6 "The Appeal Hearing"; and Supreme Court Practice Direction 8 "Miscellaneous Matters".

66 Supreme Court Rules, Rule 26(1).

67 Judicial Committee (Appellate Jurisdiction) Rules 2009, Rule 27.

Invitations to intervene?

As explained in Part A, very occasionally, a court may, of its own volition, invite interveners to make submissions. For example, in a 2006 case concerning 'after the event' insurance premiums in small civil claims, the Court of Appeal asked if any liability insurers would be interested in intervening in the case.[68] There is currently no set procedure for identifying a case where an invitation would be appropriate. The court, in extending an invitation, may provide information on the issues where it would appreciate assistance. However, invitations have so far been relatively rare and there is no set procedure for submissions in response.

When to apply

14.9 ***Pre-permission interventions***: It is possible for an organisation to make written submissions in relation to the grant of permission for judicial review (in the Administrative Court) or permission for appeal in higher courts.[69] No separate application is required for a party to make such submissions, nor is the consent of any main party required (although written submission should be served on the main parties). It is a discretionary matter for the court whether it will take into account any such written submissions, and what weight it will place upon them. Where an organisation has lodged written submissions in relation to the grant of permission for judicial review/appeal, it will not have intervener status in the substantive appeal itself (if permission to appeal is granted) unless it makes a further application for permission to intervene. An organisation might think about this kind of intervention even when it does not plan to intervene in the substantive case, but wants to make submissions on why the matter is of public importance and should be heard.

68 *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134.

69 See for example Supreme Court Rules 15(1).

CASE STUDY: Green Action considers an intervention before permission to appeal has been granted.

Green Action has identified that ***R (Jason) v Greenton City Council*** may be an appropriate test case for a key issue of interest to it, i.e. the pedestrianisation of city centres. However, it is concerned that Greenton City Council will not be granted permission to appeal as, in the first hearing in the Administrative Court, Greenton relied on fairly narrow grounds. Green Action believe that, by intervening, it will be able to introduce a much broader range of evidence and legal submissions relevant to pedestrianisation generally, which will persuade the court that there is a legal issue that merits examination.

In this circumstance, it may be appropriate to intervene before permission to appeal has been granted. If there is sufficient time, Green Action may submit its application to intervene before the decision on permission to appeal is made. As an alternative, which may be particularly useful if time is short, Green Action may submit a letter to the court expressing views on the grant of permission.

Based on the facts of the case, Green Action might wish to highlight the following issues in its application:

(a) the current uncertainty in the law regarding the interaction of environmental law with planning regulations and human rights considerations;

(b) the wider public impact of the decision, particularly given the proven environmental benefits of pedestrianisation.

Green Action should be cautious to ensure that they do not try to expand the case beyond the issues before the court. As an intervener, their role is to help the court determine the case, not to expand it to raise irrelevant or unnecessary matters.

The public interest

As the Supreme Court considered whether or not to hear an appeal by the Public Law Project challenging regulations which would introduce a residence test for legal aid eligibility, several organisations wrote interventions in support of the application for permission to appeal.

When permission was granted, both the Law Society and the Office of the Children's Commissioner were granted permission to intervene on the substantive issues in the case. The public interest in the case became plain when, extraordinarily, a panel of seven Justices stopped the hearing after one day and gave judgment in the appellants favour.[70]

14.10 ***Interventions generally***: In the Administrative Court, applications to intervene tend to be made *after* permission to apply for judicial review has been granted and before the first case management conference. In higher courts, an application for permission to intervene will normally be made in the context of the substantive appeal itself, normally following the grant of permission to appeal.[71]

14.11 In the Administrative Court and Court of Appeal, the application to intervene should be made promptly.[72] There is no specific timetable, and applications are likely to be considered sufficiently prompt if they do not delay the hearing or otherwise materially prejudice the existing parties.[73]

14.12 In the Supreme Court, applications for permission to intervene in the appeal should be filed at least 6 weeks before the date of hearing of the appeal.[74]

14.13 As explained in Part A, interveners may discover their interest and value in a case late in day. Even in circumstances when an organisation may be under time pressure, any would-be intervener should be conscious of the impact which an intervention may have on the hearing of a case and respectful of the timetables set by the relevant procedural rules or by an individual court.

Seeking the consent of the other parties

14.14 Before making any application to intervene, it is expected and prudent for the applicant to first notify the parties to the claim and seek their consent to the application. If such consent is forthcoming, in most courts the application is usually granted.[75] However, the refusal of a party to consent will not necessarily influence the outcome of the application; it is for the court to determine the merits of the application and permission to intervene is frequently granted despite a party's opposition.

70 *R (on the application of The Public Law Project) (Appellant) v Lord Chancellor (Respondent)* Case ID: UKSC 2015/0255. Judgment pending.

71 Supreme Court Practice Direction, para 8.8.1.

72 CPR 54.17(2).

73 PD 54A, para. 13.5.

74 Supreme Court Practice Direction 6, para 6.9.3.

75 PD 54A, para. 13.3.

14.15 It is good practice to attach a draft copy of the proposed application to intervene and any supporting documents to this letter, but if there is not sufficient time to draft these documents before seeking the consent of the other parties, the letter should include broadly the same information as is required for the grounds supporting the intervention and, at the least, a clear outline of the submissions which the intervener intends to make (see paragraph 14.19 below).

A precedent letter to the parties to the claim is provided in this Guide at Annex A.

14.16 Where a party has raised specific objections to an intervention, the would-be intervener may wish to provide a brief response to any concerns in their application. If an objection can be addressed by attaching conditions to an application, for example, limiting the length of an intervention to a specific number of pages, an applicant may consider expressly including those conditions in their application to intervene.

CASE STUDY: Green Action's request for the other parties' consent

Green Action has written to Janet Jason and Greenton City Council requesting permission to intervene, and requesting that (if its application to intervene is successful) neither of the other parties will seek a costs order against it after the outcome of the case. A copy of this letter is set out at Annex A.

A few weeks later, Green Action receives responses. Greenton City Council consents to its intervention. However, Janet Jason refuses both requests, claiming that Green Action's intervention will unnecessarily broaden the remit of the case, causing considerable costs to the other parties.

Green Action submits its application, including its correspondence with parties. In its application, it addresses the objections briefly, explaining its intention to limit their submissions to the areas where it has expertise and why its contribution will relate to the particular issues in dispute.

Documents required to make an application to intervene

14.17 The specific documents required to make the application differ from court to court, but broadly each application to intervene should include:

(a) an application notice;

(b) an annex to the application notice (or a witness statement) setting out the grounds for the application to intervene; and

(c) a draft Order granting the intervener permission to intervene in the form requested.

14.18 There is no special court form for applications to intervene in the High Court, Court of Appeal, Privy Council or in any tribunal. Therefore, the standard application form for the relevant forum should generally be used.[76] How these documents should then be submitted to the relevant court or tribunal is addressed below.

Witness statements

A witness statement is a formal way of presenting useful supporting information to an application regarding an organisation's background, standing and expertise. Where a prospective intervener is not well-known, a witness statement from a senior employee (a legal or policy director/manager, or Chief Executive) can provide a credible source of information to the court. A prospective intervener might also use a witness statement to explain the reasons for any potential delay in making the application (e.g. organisational constraints, late awareness of the matter). A witness statement must be verified by a signed statement of truth attesting to the truthfulness and accuracy of the content. Providing a false statement of truth constitutes contempt of court, which is a criminal offence. It is therefore vital that the content of any witness statement is carefully verified by the person giving the statement.

Interveners should build time into their timetable to agree witness statements if necessary. Some organisations have processes for sign-off which may take a substantial amount of time. Any formal processes for authorisation, if necessary, should be discussed with your legal team early in the process.

76 In 2009, we reported that in many courts and tribunals, an application by way of letter to the court would generally be accepted in lieu of an application form. See also Sir Henry Brooke, *Interventions in the Court of Appeal* (2007) Public Law 401–409, at 406. We deal with this issue below in more detail. See para 13.21.

CASE STUDY: Green Action's application notice

A precedent N244 form (for use in the High Court and Court of Appeal) setting out Green Action's application for permission to intervene is set out at Annex B.2. There is a particular form that should be used for applications to intervene in the Supreme Court: SC0002.

Grounds and intervention

14.19 The grounds for the intervention (whether in a witness statement for or otherwise) should provide details on:[77]

(a) **The claim**: identify the case in which you wish to intervene and very briefly summarise the status of the proceedings so far.

(b) **The issues in the application**: this should very briefly summarise the claimant and defendant's submissions to the extent relevant to identify the issues in the case on which your organisation wishes to intervene.

(c) **The intervener**: provide a description of your organisation and why it has expertise that may assist the court in relation to the issues on which it wishes to intervene. Relevant expertise may take a variety of forms, such as the intervener's ability to:

(i) adduce evidence (e.g. empirical studies or grassroots testimony of persons liable to be affected by a particular administrative decision);

(ii) make submissions on the relevant law (e.g. comparative material on equivalent provisions in other jurisdictions); or

(iii) provide the insight of an organisation with particular expertise that is relevant to the case at hand (e.g. an NGO that works with people with disabilities).

If your organisation has successfully intervened on similar issues before, you should provide a brief summary of your history as an intervener.

(d) **The reason for the application**: describe the public interest issues at stake in the case, their impact upon the public generally and provide an indication of the arguments that the intervention will address. It is not necessary to go into the arguments in depth – that is reserved for the substance of the intervention itself – but only to foreshadow the kinds of arguments that the intervener will run. For example, the grounds may submit that a particular piece of legislation or case-law should be interpreted more narrowly or more broadly than has been suggested by one of the parties in the proceedings so far, and describe the particular expertise that the intervener can bring to this interpretative exercise. It is not necessary to detail the specifics of the proposed submissions.

77 PD 54A, paragraph 13.3.

(e) **Consent of the parties:** provide the date on which the parties were informed about the intervener's proposed intervention and whether consent was granted or not. The relevant correspondence should be appended to the Application Notice and, if consent was not forthcoming, the grounds should include a brief summary of the reasons for the refusal. If you can answer any of the concerns raised, you should do so briefly.

(f) **Form of the intervention**: detail the form of the proposed intervention, i.e. the evidence (if any) the intervener proposes to adduce and whether the intervener proposes to make oral submissions at the hearing or only make written submissions. It may be appropriate to propose a time limit or page limit for the proposed submissions.

(g) **Timing**: in some cases, particularly those on an expedited timetable, or where the application to intervene is made shortly before the hearing, it may be appropriate to propose a deadline for the filing of written submissions, and to provide some assurances to the court that the intervention will not materially delay proceedings.

(h) **Costs**: it may be appropriate to seek a prospective order for costs (see paragraph 15.7 below). The grounds should describe the order sought and the basis for doing so (e.g. that the intervener is well placed to assist the court on the issues, but has limited resources, and in any event its submissions will be limited to a particular time/page limit).[78]

Submitting the application to intervene

14.20 In the Administrative Court, the Court of Appeal, any First-tier Tribunal and the Upper Tribunal, there are two methods by which a party may submit the relevant documents:

(a) filing a formal Application Notice at court (and paying the court fee for an application);[79] or

(b) submitting the documents under cover of a letter to the relevant court office.

CASE STUDY: Green Action's letter to the Court of Appeal

A cover letter sent by Green Action to the Registry of the Court of Appeal is set out at Annex B.1.

14.21 The advantage of a letter is that it may be drafted to include a request that the court waive the fee for filing an Application Notice, which, for example, in the High Court is £255 at the date of publication.[80] However, at least in the Court of Appeal, there is a risk that the court office will not accept the letter and will instead insist upon intervention by way of a formal Application Notice. This creates the risk of potential delay. It may be possible to mitigate this risk by enclosing a cheque for the court fee, expressly permitting the court to cash this should it refuse to waive the fee but, in urgent cases, it may be advisable to proceed by way of application.

78 PD 54A, para 13.4.

79 Application Notice (Form N244) to be submitted under Part 23 of the CPR.

80 See form EX50A HMCTS,21 March 2016. As noted above, in most circumstances an intervener will be expected to bear its own costs and therefore it is unlikely that the intervener will be able to recover this sum, regardless of the success of the intervention.

Fees and costs

For many charities and not-for-profit organisations, fees and costs may be a particular consideration in the decision to intervene. Fees are at least fixed and easy to determine at the outset of any claim. Although applications for waiver can be made, there is a limited likelihood of success in the fee being waived.[81] Any organisation seeking a waiver should, of course, seek to illustrate that its intervention is in the public interest and that it has limited funds. If the intervention will not proceed unless the fee is waived, this should be made clear.

Paying the fees

Organisations may wish to consider a joint intervention or may wish to explore other options of financial support to cover the fees associated with any application (see paragraph 9 above).

Organisations may wish to join together in a joint intervention, splitting the cost of any relevant fees. Funders and donors may have a particular interest in the public interest issues in the case and may be willing to make a grant or a donation to support the intervention. Some organisations which undertake public interest litigation have conducted crowdfunding exercises to fund the costs and fees associated with their cases.

Occasionally, a solicitors firm willing to act pro bono may treat fees and other disbursements associated with a claim as part of their pro bono commitment.

If this support is being offered, it should be clearly outlined in any client care documentation or agreement between the intervening organisation and its solicitors.

81 The Ministry of Justice published guidance entitled "*How to apply for help with fees*" (available at https://www.gov.uk/government/publications/apply-for-help-with-court-and-tribunal-fees), although this suggests that fee remission is generally targeted at individuals, and that charities and not-for-profit organisations can generally only apply for help with fees where they are making an intervention in the Supreme Court.

The Supreme Court and Privy Council

14.22 The process for submitting the application to intervene is slightly different in the Supreme Court. The application should be made on Court Form 2 ('***SC002***') and should state whether permission is sought for both oral and written interventions or for written intervention only.[82] The current fee for filing an application for permission to intervene in the Supreme Court is £800.[83] However, where an application to intervene is filed by a charitable or not-for-profit organisation which seeks to make submissions in the public interest, the Chief Executive of the Supreme Court may, at its discretion, reduce or remit the fee.[84] A request for fee reduction or remission should be made to the Registrar (see Annex B.1).[85] Charities and not-for-profit organisations may only apply for the remittal of court fees at the Supreme Court level; it is not possible to apply for a remittal in lower courts or tribunals.[86]

14.23 In Privy Council cases, the application should be made in the general form of application,[87] but in all other respects, applications to intervene before the Privy Council are identical to applications in the Supreme Court.

What are the substantive criteria for permission to intervene?

14.24 The application will be considered by a judge on the papers. In most kinds of proceedings, there are no formal criteria by which the judge decides whether to grant permission to intervene. Instead, each application is considered on its own merits.

14.25 In practice, the main criterion for whether to grant permission is whether the proposed intervention would provide the court with some information, expertise or perspective not already provided by the parties, and which would assist the court in performing its role.[88] Permission to intervene is unlikely to be granted if the proposed intervener seeks simply to duplicate the submissions of one of the parties,[89] and doing so may have costs implications for the intervener (see paragraph 15 below).

14.26 In any court or tribunal, if the court does grant permission to intervene, it may make such permission subject to conditions, e.g. concerning the length of written or oral submissions. A would-be intervener might be well advised to identify appropriate conditions for the court to consider in its application (for example, a planned page count or a limit on time for oral submissions).[90]

82 Supreme Court Practice Direction 6, para 6.9.2.

83 Fee correct as at 09/07/2015; Supreme Court Fees Order 2009/2131 as amended by Supreme Court Fees (Amendment) Order 2011/1737.

84 Supreme Court Fees Order 2009/2131, Schedule 2(21).

85 Supreme Court Practice Direction 2, para 2.1.29.

86 HM Courts and Tribunals Service Form EX160, *Court and Tribunal fees – do I have to pay them?*, 2015.

87 https://www.jcpc.uk/docs/court-form-02.pdf.

88 *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 at para 32.

89 As per Lord Hoffman in *Re E (a child) (AP) (Appellant) (Northern Ireland)* [2008] UKHL 66, at para 3: "[a]*n intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of* [one of the interveners in that case] *only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.*"

90 PD 54A, para 13.2.See also Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237, Schedule 1(35).

15. Costs

15.1 Different costs rules apply in (i) the Administrative Court and Court of Appeal and (ii) all other UK venues.

Judicial review proceedings in the Administrative Court and Court of Appeal

15.2 For judicial review proceedings commenced prior to 13 April 2015,[91] the general position is that interveners bear their own costs and at the conclusion of the case, the court will consider who should bear the costs arising from any intervention. Under this costs regime, the court has the power to make an award for costs against an intervener,[92] but in general such orders have been rare.

15.3 Judicial review proceedings commenced on or after 13 April 2015 are subject to the new costs regime introduced in Part A.[93] There is now a statutory presumption that interveners should bear their own costs and a party to the judicial review cannot be required to pay an intervener's costs unless exceptional circumstances make this appropriate.[94]

15.4 A party may apply to the court to request that the intervener pay that party's costs arising from the intervention.[95] The court must make such an order if one of the following conditions are met:

(a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;

(b) taken as a whole, the intervener's evidence and representations have not significantly assisted the court;

(c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage of the proceedings; or

(d) the intervener has acted unreasonably.[96]

However, the courts retain their discretion not to award costs if it would be inappropriate to do so.[97] In determining whether this is the case, the court must have regard to criteria which are specified in the rules of court. Amendments to Part 54 to produce further guidance have not yet been produced.[98]

15.5 How these rules will be applied in practice by the courts is still uncertain. A recent report by JUSTICE, the Bingham Centre and the Public Law Project, considers that it is targeted at abuse of process by interveners or unreasonable behaviour not properly able to assist the court.[99] Acting as a reasonable intervener, within the bounds of the permission granted by the court may significantly reduce the likelihood that a costs order might be considered under the new statutory framework.

91 It is the date at which the Claimant commenced the underlying proceedings, rather than the date of the intervention, that determines which costs regime applies to the intervention.

92 Section 51 Senior Courts Act 1981. This power was used in *R (E) v JFS & others* [2009] UKSC 15, where the court made a costs order against an intervener (the United Synagogue) as it had become, in effect, one of the main parties.

93 Section 87(6) Criminal Courts and Justice Act 2015.

94 Section 87(6) Criminal Courts and Justice Act 2015.

95 CPR 46.15(2). The application is made under the Part 23 procedure.

96 Section 87(6) Criminal Courts and Justice Act 2015.

97 Section 87(8) Criminal Courts and Justice Act 2015.

98 Section 87(8) Criminal Courts and Justice Act 2015.

99 The Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, *Judicial Review and the Rule of Law: An introduction to the Criminal Justice and Courts Act 201, Part 4*, para 3.7 et. seq.

CASE STUDY: Greenton City Council request Green Action's assistance

Elaine Graham, the in-house lawyer at Greenton City Council, contacts Green Action, asking it to make submissions on particular points because Greenton City Council is too under-resourced to cover everything effectively.

Green Action should tread carefully here. It must consider the limitations of its role as intervener, and be aware of the costs risk of acting in the manner of one of the parties:

(a) Whilst there may be some limited communications between one party and the intervener to prevent any overlap in submissions, extensive contact that leads to Green Action 'taking on' certain arguments runs the risk of its independence being compromised, which may result in the court placing less weight on its submissions.

(b) 'Taking on' certain arguments may also open Green Action up to costs risk, if they are arguments that should properly be run by Greenton City Council, and are only being 'passed' to Green Action because of resource reasons.

As such, we would also ask for an undertaking that your client will not seek costs against Green Action as intervener. For its part, Green Action undertakes that it will not seek costs against any party, and further will bear costs associated with the printing of additional materials required by its intervention, should permission be granted.

(See Annex A)

Green Action also seeks a prospective order as to costs from the Court of Appeal when it makes its application to intervene, drafting the following in its covering letter to the court:

In the event that the permission to intervene is granted, Green Action requests that such permission be granted on the basis that it will neither seek nor be required to pay costs, on the grounds that Green Action is, for the reasons set out in the application enclosed, uniquely well placed to assist the court on the issues which it seeks permission to address, is able to bring a wider perspective to bear on those issues than any one party to the proceedings and has substantial experience and expertise on the issues before the Court.

(See Annex B.1)

15.6 Where the court invites an intervention of its own volition, then the presumptions set out at paragraphs 15.2 and 15.3 do not apply and costs will be at the court's general discretion.[100]

15.7 The intervener may seek a prospective order as to costs, which may provide greater certainty on cost risks. Ordinarily, this order will provide that the intervener will neither seek costs from any of the other parties nor be required to pay costs of those other parties.

15.8 The application should specify the type of costs order and the grounds for seeking such an order.

CASE STUDY: Managing the costs risk in Green Action's proposed intervention

Green Action is confident that its intervention will assist the court and will not duplicate Greenton City Council's arguments. However, it remains concerned about the possibility of a costs award being made against it.

Therefore, it requests an undertaking on costs from the other parties to the proceedings, and includes the following language in its letter seeking consent to the intervention:

As a charity and not-for-profit organisation with limited funds, our client is understandably concerned about the possibility of a costs order being made. We note that the Court will not ordinarily award costs in favour of, or against, an intervener. As such, we would also ask for an undertaking that your client will not seek costs against Green Action as intervener. For its part, Green Action undertakes that it will not seek costs against any party, and further will bear costs associated with the printing of additional materials required by its intervention, should permission be granted

(See Annex A)

Green Action also seeks a prospective order as to costs from the Court of Appeal when it makes its application to intervene, drafting the following in its covering letter to the court:

In the event that the permission to intervene is granted, Green Action requests that such permission be granted on the basis that it will neither seek nor be required to pay costs, on the grounds that Green Action is, for the reasons set out in the application enclosed, uniquely well placed to assist the court on the issues which it seeks permission to address, is able to bring a wider perspective to bear on those issues than any one party to the proceedings and has substantial experience and expertise on the issues before the Court.

(See Annex B.1)

Finally, Green Action includes the following language in the draft Order enclosed with its application:

(a) the Applicant will bear its own costs of the intervention; and

(b) no order as to costs shall be made in favour of, or against, the Applicant as a third party intervener.

(See Annex B.3)

100 Section 87(1) Criminal Courts and Justice Act 2015; section 51 Senior Courts Act 1981.

Costs in other kinds of cases

15.9 ***Supreme Court***: The new costs regime set out at paragraph 15.2 *et seq.* above does not apply to judicial review proceedings heard by the Supreme Court. Subject to the discretion of the court, interveners bear their own costs. Any additional costs to the parties resulting from an intervention are costs in the appeal.[101] In general, orders for costs will not be made in favour of or against interveners. However, such orders may be made if the court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent).[102] The same rules apply in the Privy Council.

15.10 ***Civil proceedings in the High Court or Court of Appeal***: The new costs regime does not apply to non-judicial review claims in the High Court or Court of Appeal. Orders as to costs are at the discretion of the court.[103] Due to the fact that relatively fewer interventions have been made in these kinds of proceedings, the position on costs is not settled, but it seems likely that the courts would apply the 'old' costs regime, as per paragraph 15.2 above.

15.11 ***Tribunals***: Different costs regimes apply across the tribunal chambers and in different types of case, for example, in some chambers there is no power to make any award of costs.[104] In general, however, the rule is that costs will be at the discretion of the First-tier Tribunal and there are no specific costs rules that apply to interveners.[105] In the Upper Tribunal, the general position is that interveners bear their own costs and at the conclusion of the case, the court will consider who should bear the costs arising from any intervention. As noted above, public interest interventions are unlikely in the Employment Tribunal. However, in the event that an intervention is allowed, the usual position in that tribunal is that the parties are expected to bear their own costs.[106]

101 Supreme Court Practice Direction 6, para 6.9.6. This means that the Court will make an order that the unsuccessful party pay the costs incurred by the parties as a result of the intervention.

102 Supreme Court Practice Direction 6, para 6.9.6.

103 CPR 44.2.

104 The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, Rule 10; and in mental health cases The Tribunal Procedure (First-Tier Tribunal) (Health, Education And Social Care Chamber) Rules 2008, Rule 10(2).

105 Section 29 Tribunals, Courts and Enforcement Act 2007.

106 *Gee v Shell UK Ltd* [2003] IRLR 82.

16. Northern Ireland

16.1 Interventions in Northern Ireland, like in England and Wales, were historically governed by a general discretion of the court to hear persons, reflected in the Rules of the Court of Judicature (Northern Ireland) 1980.[107] However, there was widespread recognition that the practice lacked transparency.[108] In 2013, a Practice Direction was introduced, which broadly mirrors earlier common law practice in Northern Ireland and England and Wales, and which closely resembles the practice consolidated in the Supreme Court Rules.[109]

16.2 Practice Direction 1/2013 confirms that interventions may be brought by bodies including statutory commissions, government and NGOs, and others.[110] Interventions are not limited to judicial review proceedings, but may be pursued in private law proceedings.[111]

16.3 Importantly, in Northern Ireland, the Practice Direction addresses some practical questions which may affect the conduct of an intervention, and the likelihood that it will be granted permission. For example, it specifically deals with the potential for joint interventions to save time, and encourages interveners to work together to ensure that interventions are focused and well-organised.[112]

16.4 Any application is by letter sent to the relevant court office **at least 21 days** before the relevant hearing. The application should address:

(a) the name and description of the proposed intervener;

(b) the nature of the intervener's interest in the proposed intervention and the proceedings;

(c) an indication of the substance of the intervention and how it serves the interests of justice;

(d) whether the intervention might be by way of oral or written submissions;

(e) whether the parties have consented; and

(f) any history of the applicants in previous applications for permission.

107 Order 53, Rule 9(1) provides "*On the hearing… any person who desire to be heard in opposition who desires to be heard in opposition to the motion, and appears to the court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion*". Rule 5(3) requires that the application should be served on all parties likely to be directly affected. The Court can take a proactive approach to identifying those parties who are likely to be interested in the proceedings.

108 See for example, commentary by the Northern Ireland Human Rights Commission, in consultation on the Draft Practice Direction, *NIHRC, Response, Third Party Interveners,* para 5 2013. http://www.nihrc.org/documents/advice-to government/2013/NIHRC%20Response%20Third%20Party%20Interveners.docx.

109 Practice Direction 1/2013.

110 Practice Direction 1/2013, [6].

111 Practice Direction 1/2013, [7].

112 Practice Direction 1/2013, [6].

16.5 Any application must be served on the parties, but a refusal to consent is not fatal to an application for permission to intervene. Permission is at the discretion of the court.[113] Permission can be granted for written submissions and/or oral submissions.

Any written submission must usually be lodged **13 days before** any hearing.[114] It is thus in the interests of any intervener in Northern Ireland to act as early as possible to pursue their intervention. An applicant waiting until the last minute to pursue an intervention may find themselves with only 7 days to prepare their case, although time limits can be modified at the discretion of the court.[115]

16.6 Costs orders, reflecting practice in the Supreme Court, are not normally made, in favour of interveners or against. However, the court may make any order if it considers it just to do so.[116] The Practice Direction clearly states that any intervener may make an application for a Protective Costs Order.[117]

British Irish Rights Watch (now Rights Watch) intervened in the case of ***Arthurs***. Brian and Paula Arthurs were charged with mortgage fraud and were to be tried using the 'Diplock' process (that is, without a jury). British Irish Rights Watch was granted permission to intervene to make submissions on the right to a fair hearing, including as protected by Article 6 ECHR and by the common law.[118]

In the case of ***Keyu*** the Supreme Court considered interventions from the Attorney General of Northern Ireland and the Pat Finucane Centre and Rights Watch. Although this case involved matters relating to the Batang Kali massacre, the court was required to consider what historical events might be subject to the obligations of the UK under the European Convention on Human Rights. Specifically, the Supreme Court was required to consider when a duty would arise in relation to events before the Convention was ratified by the UK. Both interventions made significant written submissions on this issue.[119]

113 Practice Direction 1/2013, [14].

114 Practice Direction 1/2013, [15].

115 Practice Direction 1/2013, [17].

116 Practice Direction 1/2013, [18].

117 Practice Direction 1/2013, [19].

118 *Arthurs Application* [2010] NIQB 75 (This case preceded the 2013 Practice Direction).

119 *Keyu & Ors v Secretary of State for Foreign and Commonwealth Affairs & Anor* [2015] UKSC 69.

17. Scotland

17.1 It has been recognised as competent since at least 1876 for an interested party to be given an opportunity to appear in proceedings in Scotland.[120] However, no express provision was made in the relevant chapter of the Rules of the Court of Session (***RCS***) until 2 October 2000.

17.2 On that date (not insignificantly also the date on which the Human Rights Act 1998 came into force), a new rule 58.8A was introduced into the chapter governing judicial review (Chapter 58) and the substance of that provision for intervention remains in force notwithstanding the changes to judicial review brought about by the Courts Reform (Scotland) Act 2014.[121]

17.3 The rule governing public interest intervention has not been much used, and such intervention in the Scottish courts remains rare.

17.4 More common (although still far less frequent than in England and Wales) are interventions by the Equality and Human Rights Commission, which has its own specific rules of court.[122] The Scottish Human Rights Commission also has a specific statutory framework for intervention although its rules have not to date been used.[123] Interventions are becoming more common, however, and are likely to become even more so with each case in which a helpful intervention is made.

Cadder and the right to legal assistance in police detention

In the case of ***Cadder***, the Supreme Court was invited to consider whether the arrangements in Scotland which allowed individuals to be interviewed in police custody without access to legal advice were compatible with the right to a fair hearing protected by Article 6 of the ECHR. The court, finding a violation of Convention rights, praised the intervention by JUSTICE. JUSTICE intervened to provide submissions on the case-law of the ECtHR and international and comparative law practice. Lord Hope's judgment described JUSTICE's submissions as "helpful".[124]

This case has had a profound effect on the criminal justice system in Scotland, leading to new law and practice designed to protect the right of access to legal advice at the police station.[125]

120 *Lord Blantyre v Lord Advocate* (1876) 13 SLR 213.

121 Act of Serudunt (Rules of the Court of Session (Amendment No 5) (Public Interest Intervention in Judicial Review) (2000) SSI 2000/317 (As amended). This section introduced a new Rule 58.8A into the Rules of the Court of Session, permitting, for the first time, interventions to be pursued in judicial review proceedings in Scotland. These Rules have since been amended subsequent to the judicial review reforms in the Courts Reform (Scotland) Act 2014.

122 RCS, Ch 94.

123 RCS, Ch 95.

124 *Cadder v HM Advocate* [2010] UKSC 43.

125 Criminal Justice (Scotland) Act 2016.

17.5 The current rule governing public interest intervention in judicial review proceedings is RCS 58.17. Any person who has not been specified as a person who should be served with the petition[126] and is not "*directly affected*" by any issue raised in the petition may pursue an intervention under these rules.[127]

17.6 An application is made, by way of an application for leave to intervene, in either: (i) the decision whether to grant permission; (ii) the petition proceedings, once permission has been granted; or (iii) in an appeal in connection with a petition for judicial review, the latter stage thus appearing to catch appeals in relation to a refusal to grant permission, as well as an appeal on the merits after the petition has been heard.

17.7 An application is by way of a minute of intervention in Form 58.18.[128] The minute is in a similar form to an application in England and Wales (described above) and it must include:

(a) the name and a description of the applicant, which it is suggested ought to include a brief statement as to the applicant's expertise;

(b) a brief statement of the issues which the applicant wishes to address and the applicant's reasons for believing that that issue raises a matter of public interest; and

(c) a brief statement of the propositions to be advanced by the applicant together with an explanation of why they are thought to be relevant to the issues before the court, and why they will assist the court to determine the matter.[129]

17.8 The court may consider the issue on the papers, but can, including on application by any of the parties, appoint the proposed intervention to a hearing to consider the application.[130] The court will only allow an intervention to proceed where:

(a) the proceedings raise a matter of public interest;

(b) the issue in the proceedings which the applicant wishes to address raises a matter of public interest;

(c) the propositions to be advanced by the applicant are relevant to the proceedings and are likely to assist the court; and

(d) the intervention will not unduly delay or otherwise prejudice the rights of the parties, including their potential liability for expenses.[131]

17.9 In Scotland, interventions are generally by written submissions of 5,000 words or less.[132] In "*exceptional circumstances*", longer submissions and oral interventions may be permitted at the discretion of the court.[133]

17.10 As in England and Wales, the primary risk factors for public interveners in Scotland are fees and liability for expenses (costs).

126 RCS 58.17(1)(a). Specification as such a person may take place at the stage of the petition being accepted (by virtue of the person having been specified as such a person in the petition itself), or at the stage of permission being granted, or in the course of any procedural hearing. See: RCS 58.4(1), 58.11(2) or 58.12(2).

127 A person who is directly affected and was not specified as a person who should be served with the petition may apply by motion for leave to enter the process under RCS 58.14, although this obviously brings with it expense implications.

128 Rule 58.18.

129 Rule 58.18.

130 Rule 58.19 (1).

131 RCS 58.19 (4).

132 RCS 58.20 (2).

133 RCS 58.20 (4).

17.11 Fees in any application are not likely to be subject to a waiver, and would-be interveners are similarly presumed to meet their own expenses.[134] As in England and Wales, an individual or an organisation with limited funds but material of value to place before the court may wish to consider providing that information to the parties, or offering to act as a witness or an expert witness for the party whose interests are most closely allied to their own.

17.12 Liability for the expenses incurred as a result of intervention in Scotland is left to the discretion of the judge, although in practice, at least where the parties are publicly-funded, most interventions proceed on the prior agreement of parties that each will bear their own expenses.[135] Where such agreement is not forthcoming, a potential intervener may wish to consider whether a protective expenses order (***PEO***) would be appropriate. Some guidance has been given in recent case-law. At first instance in the ongoing legislative competence challenge to the Alcohol (Minimum Pricing) (Scotland) Act 2012, Lord Hodge granted a PEO in favour of the charity Alcohol Focus Scotland (***AFS***), which had the effect that each of the parties would meet their own expenses of the intervention, explaining:

> *"I am satisfied that it is in the interests of justice to make an order providing that there should be no liability by any party in expenses in relation to the intervention rather than one which caps AFS's liability. In reaching this view I have also had regard to the considerations (i) that the issues raised in the judicial review application are of general public importance, (ii) that there is a public interest in the resolution of those issues, (iii) that AFS has no private interest in the outcome of that application, (iv) that the resources available to the petitioners and the limited nature of the proposed intervention mean that that intervention will not impose a significant extra burden on the petitioners in the context of their judicial review challenge and (v) that AFS would be acting reasonably in not making its intervention in the absence of the order which it seeks."*[136]

17.13 Relevant considerations included that the organisation concerned had clearly identified the limits of the submissions they wished to make, that their purposes were charitable and that they had limited funds for those purposes. It was important that they had given an indication that they would not proceed with the intervention, conceded to serve a public interest, in the absence of protection against an adverse award of expenses. A further intervention was sought to be made on appeal for the purposes of the subsequent reference to the CJEU but that application was unsuccessful.[137]

Practice in other proceedings

17.14 There is no express provision in the rules for public interest intervention in ordinary civil proceedings beyond judicial review, or in criminal proceedings before the High Court of Justiciary, whether sitting as a court of first instance or as a court of appeal. Public interest interventions have, however, been permitted in a range of other cases notwithstanding the absence of formal procedural provision, with practice tending to mirror the Chapter 58 procedure for intervention in judicial reviews.

134 RCS 58.19 (3).

135 RCS 58.19 (5).

136 [2012] CSOH 156.

137 *[2014] CSIH 64.*

17.15 ***IA (Iran) v Secretary of State for the Home Department*** provides a good example. This was an appeal to the Inner House from the Upper Tribunal which concerned mandate refugee status (afforded when the UN itself considers an individual to be entitled to international protection). In proceedings before the Inner House, both on the application for leave to appeal and the substantive hearing on the appeal, the UN High Commissioner for Refugees was granted permission to intervene, both orally and in writing, the court broadly following the rules for intervention in connection with judicial review.[138]

17.16 ***Anwar, Respondent*** provides an interesting example from the criminal courts. Mr Anwar is a prominent human rights lawyer based in Glasgow, who was at the time representing an individual who had been found guilty after trial of contraventions of the Terrorism Acts 2000 and 2006. After conviction but prior to sentence, Mr Anwar read a statement outside the court building in the presence of the media and gave a television interview in which he made comments regarding the conduct of the trial and the possible sentence. He was subsequently charged with contempt of court and Liberty was granted permission to intervene in the High Court of Justiciary sitting as an appeal court in order to make submissions as to the compatibility of the law of contempt of court with Article 10 ECHR.[139]

18. The European Court of Human Rights

18.1 The ECHR and the Rules of Court of the European Court of Human Rights (***ECtHR***) provide that the President of the Court may grant permission to any person concerned to intervene in the interest of the proper administration of justice.[140] A number of UK NGOs have successfully applied to intervene at the ECtHR in recent years.

How to apply?

18.2 There is no prescribed form for intervention, no fee for requesting permission and no need to seek the consent of the parties. The only requirements are that the requests must be duly reasoned and made in one of the official languages of the ECtHR – French or English.[141] The usual approach of NGOs in the UK is to fax a letter requesting permission to the Registry of the Court, setting out the relevant case, the NGO's interest and a brief outline of the proposed intervention.

18.3 The time limit for requesting permission to intervene is 12 weeks from the date when the ECtHR notifies the relevant State defendant that the case has been accepted, that is, the case is "communicated". Where a case has been referred or relinquished to the Grand Chamber, interveners have 12 weeks from that later decision.[142] Late applications are not normally considered.

138 [2011] CSIH 28, [2011] SC 625 The case was ultimately heard in the Supreme Court, reported at [2014] UKSC 105.

139 2008 JC 409.

140 Article 36(2) European Convention on Human Rights; Rules of Court of European Court of Human Rights, rule 44.

141 Rules of Court of European Court of Human Rights, rule 44(3)(b).

142 Rules of Court of European Court of HumanRights, rule 44(3)(b).

18.4 Assuming that a reasoned application is made within the time limit, permission to intervene by way of written submissions is almost always granted, subject to the standard conditions that the submissions will not exceed ten pages and that the intervener will not seek to address either the facts or the merits of the case. However, poorly reasoned requests will be refused. The Registry may seek to reduce the number of requests for permission by encouraging interveners to consider making a joint submission. As in domestic proceedings, joint interventions can have a particularly important impact while reducing the material placed before the court. Permission to make oral submissions at the hearing is rarely sought and almost never granted.[143]

18.5 The ECtHR has a very limited power to award costs; it may only award costs if this is necessary to "afford just satisfaction" to a successful applicant. There is no specific provision in the Convention or the Rules of the ECtHR to make costs awards against interveners or unsuccessful applicants. Interveners should expect to meet their own costs and to have no order made against them.

In the case of ***AT v Luxembourg***, Fair Trials was granted permission to intervene. Their submissions drew upon comparative law concerning the insufficient protection of the right to a lawyer in criminal proceedings across the EU and invited the ECtHR to take account of the provisions of the EU Directive on Access to a Lawyer. The court cited the Directive in its finding (for the first time) that the right of access to a lawyer under Article 6 ECHR includes a right to a private consultation before questioning by the investigating judge.[144]

In ***Rantzev v Cyprus & Russia*** the ECtHR held for the first time that the trafficking of human beings fell within the scope of the prohibition on forced labour and slavery in Article 4 ECHR. INTERIGHTS was granted permission to intervene and their submission had emphasised that trafficking was modern day slavery, condemned by international human rights law. It also emphasised the many positive and investigative obligations historically part of the obligations under the Convention. The court emphasised the positive obligations and investigative duties owed by States under the Convention. This was an historic development in the campaign against human trafficking.[145]

143 INTERIGHTS was invited to make oral submissions at the hearing before the Grand Chamber in *Opuz v Turkey* (App No 33401/02, 9 June 2009).

144 App No 30460/13, Judgment 9 April 2015. You can read a press release from Fair Trials here: https://www.fairtrials.org/press/a-t-v-luxembourg-european-court-of-human-rights-follows-eu-law-on-access-to-lawyer/.

145 App No 25965/04, Judgment 7 January 2010. You can read a press release from INTERIGHTS here: http://www.interights.org/rantsev/index.html.

19. The Court of Justice of the European Union

19.1 Involvement in proceedings in the Court of Justice of the European Union (***CJEU***) may be of particular interest to certain NGOs given the extensive competences of the EU and the potential availability of the EU Charter of Fundamental Rights as a basis for review of national legislation or administrative action. There may be an additional public interest in ensuring certain cases are elevated to the CJEU so that a determination may be reached with EU-wide effect. While there can be significant advantages to intervening in a case that is ultimately referred to the CJEU, it is important to consider this course of action carefully: as explained further below, it can cause delays in proceedings, and submissions to the CJEU can be circumscribed.

19.2 The right of third parties to intervene in cases before the CJEU is very limited.[146] There are two types of action before the CJEU, preliminary references and direct actions:

(a) Preliminary references are requests to the CJEU from domestic courts for authoritative interpretation of points of EU law.[147]

(b) Direct actions are disputes between institutions or individuals for breaches of EU law and include: (i) proceedings for failure to fulfil an obligation under the treaties; (ii) proceedings for the annulment of EU law; (iii) proceedings for failure to act; and (iv) proceedings to establish liability and award damages in civil suits brought against the EU.[148]

Preliminary reference

19.3 An illustration of how the preliminary reference procedure fits into UK proceedings is set out in the diagram at the start of Part B. It should be noted that the 'average' CJEU case is not particularly swift – in 2015, the average time taken to deal with a preliminary reference (from official notification to judgment) was slightly more than 15 months. However, the urgent procedure, if invoked in asylum, immigration, civil or criminal cases, can speed this up to a matter of months.[149]

146 Article 40(2) Statute of the Court of Justice of the European Union.

147 Article 267 Treaty on the Functioning of the European Union (*TFEU*).

148 Articles 258, 263, and 265 TFEU.

149 See Article 23a of the Statute and Articles 107 and 114 of the Rules of Procedure for the General Procedure.

Who can apply for a preliminary reference?

19.4 Any party can apply for a preliminary reference. An intervener in domestic proceedings may, in either its oral or written submissions, suggest that the court make a preliminary reference on an issue that it has raised.[150]

19.5 If the court is persuaded a reference is necessary, it will submit the reference in the prescribed form to the CJEU. In practice, the court's reference will often be drafted by the party requesting the reference (and, if possible, agreed between the parties). If one of the main parties requested the reference, the court may give the intervener the opportunity to comment on its proposed draft reference.

19.6 It may be important for an intervener in domestic proceedings with an EU law element to understand when a reference may be possible. In some cases, an intervener may want to make submissions on why a reference is necessary or why the domestic court can deal with the issue without one.

In 2012, JUSTICE was granted permission to intervene in ***SS (Libya) v Secretary of State for the Home Department.*** JUSTICE sought to make submissions on the legality of the closed material procedures operated by the Special Immigration Appeals Commission with EU law. JUSTICE explained in their written submissions that they hoped to intervene in the domestic proceedings with a precursor to playing part in proceedings before the CJEU if a reference were made.[151]

150 "*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*" Article 267 TFEU.

151 [2011] EWCA Civ 1547.

How does an intervener participate in a preliminary reference?

19.7 The rights of third parties to intervene in a preliminary reference are very restricted. Interveners may only participate in the preliminary reference proceedings if they are party to the main proceedings, i.e. if they have been granted permission to intervene in the domestic proceedings by the domestic court[152] prior to the reference being made[153] – although such interveners have the status of a main party at the CJEU level.

19.8 However, even if a party is granted permission to intervene in domestic proceedings, this does not necessarily guarantee standing to appear before the CJEU. In ***R (British American Tobacco UK Ltd) v Secretary of State for Health***[154] the court noted that the explanatory remarks to Article 97 indicate that the Article was introduced to "*circumscribe... the concept of parties to the main proceedings.*" Therefore, the court concluded that not every intervener is automatically a party, and the domestic court should examine the nature and extent of the intervention and exercise "*proportionate restraint*" in so classifying them.[155]

19.9 In direct action cases, interventions are only possible where the intervener can establish an interest in the result of a case,[156] for example where it is directly affected by the contested measure.[157]

19.10 Therefore, the role of a third party in such a case is more akin to the 'interested party' regime in the UK, and will not generally be suitable for public interest interventions.

19.11 Practically, there is a 'hierarchy of interveners' in the context of references to the CJEU. Those with sufficient interest in the outcome of proceedings will generally be granted standing to appear in the CJEU. This is not necessarily difficult to prove; for example, an intervener would most likely not need to show a financial interest in the outcome. The CJEU, like the domestic courts, will not permit an intervention for no reason. The court is particularly sensitive to interventions which may delay the proceedings for no legitimate purpose.

152 Articles 96 and 97 Rules of Procedure of the Court of Justice.

153 Joined cases C-403/08 and C-429/08 *FA Premier League v QC Leisure* [2010] ECR I-09083.

154 *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin).

155 Ibid. para 41.

156 Article 50(2) Statute of the Court of Justice of the European Union. Third parties must be able to show a direct, existing interest in the ruling on the form of order sought by the parties (Order of the President of the Court of 6 April 2006 in Case C-130/06 P(I) *An Post v Deutsche Post and Commission*, para 8).

157 Order of the President of the Court of 25 January 2008 in Case C-461/07 P(I) *Provincia di Ascoli Piceno and Comune di Monte Urano v Sun Sang Kong Yuen Shoes Factory*, para 5.

The AIRE Centre (Advice on Individual Rights in Europe) intervened in the ***MA/BT*** case concerning the treatment of unaccompanied asylum seeking children under the EU immigration regime (the "Dublin II" Regulation).[158] The AIRE Centre submitted that rights of the child protected in the International law and EU law prevented the sending of trafficked children back to the EU member state that had first received them. Instead their claims should be considered in accordance with the best interests of the child (which would usually mean that their claims should be heard in the country they were presently residing).

Having intervened in the Court of Appeal, the AIRE Centre renewed its intervention in the Supreme Court, which determined that as the case concerned the interpretation of an EU law instrument, it must be referred to the CJEU. The AIRE Centre, as an admitted intervener, was entitled to comment on the terms of the order for reference that was made to the CJEU. Having been admitted as an intervener prior to the order for reference being made, the AIRE Centre was treated as a main party to the CJEU proceedings, and as such submitted written observations and appeared orally at the hearing.

The AIRE Centre submission helped secure an interpretation of the Dublin II Regulation that permit the best interests of the child to be taken into account as a primary consideration in all cases across the entire EU involving unaccompanied asylum seeking children.

Overview of the CJEU procedure

19.12 The process at CJEU level once a reference has been made is relatively structured. The key procedural steps are set out in the diagram overleaf.

Costs

19.13 Preliminary reference proceedings before the CJEU are free of charge and the CJEU does not rule on the costs of the parties to the domestic proceedings; which is a matter left to the referring national court.[159]

158 Case C-648/11 *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department.*

159 Article 102 Rules of Procedure of the Court of Justice; Information Note on references from national courts for a preliminary ruling (2009/C 297/01) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF.

OVERVIEW OF CJEU PROCEDURE

WRITTEN PROCEDURE

Court of Appeal makes reference to the CJEU.

Deadline for written observations (**two months and ten days after notification**).[1]

Parties and interveners inform the Registrar in writing of any errors or omissions in the Report for Hearing at the earliest opportunity in advance of the hearing.

The reference is translated into the other official languages of the EU.

A notice of the questions referred for preliminary ruling is published in the Official Journal of the EU (available online). The parties, Member States EEA States and the EU institution of the reference and are invited to make written observations.

A judge-rapporteur (who is charged with managing the case) and Advocate General are allocated.

The judge-rapporteur draws up an internal preliminary report, setting out the questions to be answered and the main points raised by the parties and interveners.

Translation of written observations into the language of the case. These are cirulated to the parties, the Member States and the Institutions.

At a general meeting of the Judges and Advocate General the case is assigned to a particular formation of the Court (either three, five or thirteen judges, depending on the nature of the Issues raised in the reference).

The Report for the Hearing is circulated to the parties. The Report for Hearing identifies the questions referred and the points raised by the parties and interveners.

2 months 10 days (timing not fixed beyond this point)

ORAL PROCEDURE [2]

Hearing.

The Opinion of the Advocate General is delivered.[3]

Judgment made and submitted for translation but not yet published.

Judgment to be delivered (with translation).

Deliberation by the Judges.

Anticipated timing of key events

Processes pursued by Court and parties

Note 1: These can be filed with the CJEU using the e-curia website, and do not need to be served on the other parties. The CJEU will then translate any written observations received into the relevant languages and circulate them to the parties. There is no set time limit for this process, and it can take several months. The Registry of the CJEU may be able to provide an estimate as to timings. There is no right to submit further written observations in reply to written observations submitted by other parties. Therefore, when drafting written observations, it may be appropriate to attempt to pre-emptively address arguments that it is thought the other parties may wish to run.

Note 2: Oral hearings are not automatic in the CJEU system. After the CJEU circulates the parties' written observations, the parties (including any intervener) have three weeks within which to submit a letter requesting a hearing. CJEU hearings are also generally very short. Counsel will be granted no more than 20 minutes to make oral submissions (which must follow a prepared script which is submitted to the Chamber in advance of the hearing); an intervener may be afforded less time.

Note 3: Although this Opinion does not bind the CJEU, the Opinion is followed in 60–70% of cases. The CJEU will issue its judgment within six to twelve months of the Opinion. The ruling of the CJEU will then be transmitted to the national court. The national court is bound by the ruling of the CJEU and will apply the judgment in the national proceedings that triggered the reference will resume.

15.3 months (average length of procedure)

SECTION 2: MANAGING AND DRAFTING THE INTERVENTION

20. Introduction

20.1 If your application for permission to intervene is successful, you will have the opportunity to make written (and, if permission is granted, oral) submissions to the court for its consideration at the hearing of the case.

20.2 Well prepared and robust written submissions are the intervener's best opportunity of influencing the proceedings by giving the court the benefit of its expertise.

20.3 It is therefore hugely important that written submissions are drafted in a way that delivers this expertise effectively: as with all legal drafting, clarity and precision are key.

20.4 This chapter will deal with some of the drafting points you may wish to consider when putting together written submissions for an intervention, as well as some practical tips offering guidance on particular issues you may encounter, such as the use of witness evidence or including comparative material. **Annexes to this Guide provide some precedents which might help illustrate how best to present your submissions. These incorporate some useful reminders from ordinary good practice, but crucial to the success of a persuasive intervention**.

20.5 The points identified below are applicable to interventions generally, although where relevant we provide specific, useful pointers in relation to some of the courts and tribunals discussed in Section 1 above.

The intervener's day in court?

Permission to make written submissions is more readily granted than oral submissions. This is perhaps understandable. Where there is a premium on court time, the priority must be for the court to hear from the parties to the case.

Permission for oral submissions – particularly in the Court of Appeal and the Supreme Court – happens increasingly frequently. However, the time provided for oral submissions is very limited (less than an hour and usually around thirty minutes). A reasonable intervener may find that they may have to surrender part of their time to allow the parties' cases to be heard fully.

Where permission for oral submissions is granted, the intervener should discuss with their counsel during the hearing how best to use the limited time to assist the court.

Interveners making oral submissions are well advised to attend throughout the hearing, in order to follow the development of the parties' arguments before the court and to give full instructions to counsel.

There are a number of reasons why interveners should pursue the opportunity to make oral submissions. For example, written submissions are "frozen in time" and their impact may be diluted if the legal arguments are advanced during oral argument. There may be a particular problem if the court has questions about the substance of an intervener's case and they are not represented by counsel on the day of a hearing. If these questions go unanswered, the ability of the intervener to assist the court may be significantly undermined and submissions could have an impact entirely unintended by both counsel and the intervener.[160]

160 The usual instruction to interveners who have permission to make written submissions is that counsel may attend but are not required to do so. When counsel are acting pro-bono this can create a difficult demand, where a team may be asked to attend at no cost with no guarantee that they may be called upon to assist. In 2009, we agreed with the suggestion of Michael Fordham QC that there should be a presumption in favour of counsel attending with a view to brief oral submissions. Final case management on the day should, of course, be in the hands of the judge. See Michael Fordham, *Public Interest Intervention: A Practitioner's Perspective* [2007] Public Law 410–413, at 411.

21. Planning and timing

21.1 Once you have been granted permission to intervene, one of the first steps you might wish to consider is to agree a timeline with the other parties for the filing of written cases.

21.2 The Supreme Court Rules envisage written submissions to be made at the same time as the respondents.[161] However, in practice, you may wish to consider writing to the other Parties to request their agreement to you filing your submissions shortly (perhaps only 2 or 3 days) after the respondent files its own submissions. In this way you will be able to be absolutely sure you avoid duplicating any of the arguments made by any of the other parties to the proceedings. Subject to obtaining the agreement of the other parties, you should then request permission from the court registry, again emphasising that having sight of the respondent's case before filing your own will ensure you avoid duplication of any kind. This proactive approach can provide a more workable timetable in lower courts and tribunals, subject to the agreement of the judge with charge of the case. The earlier an intervener is involved in a case, the greater the opportunity they will have to inform the timetable for the litigation.

21.3 While agreeing a more flexible timeline may be of interest to all parties, there may be instances (for example, where permission to intervene is granted late and the timeline becomes too compressed to allow for your submissions to be filed later than the respondent in order that the court bundle is completed on time) where making such a request would not be sensible – this will be a matter for you to judge depending on your particular circumstances.

22. Drafting the intervention

22.1 As with applications to intervene, written submissions themselves should be succinct.

22.2 The submissions should be drafted with regard to the obligation on interveners not to duplicate points made by other parties in the proceedings, and to seek to 'add value' to the proceedings as a whole. An intervener's job is to assist the court in interpreting the law in the correct way: it should not divert the court's attention away from the key issues in the proceedings.

22.3 The scope of the submissions must also stay true to that requested in the intervention application, as the application is the basis on which the court has granted the intervener permission to intervene in the first place.

22.4 In this respect, regard should be had to the robust guidance provided by Lord Hoffman at paragraphs 2 and 3 of his opinion in ***E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)*** [2008] UKHL 66, [2009] 1 AC 536 (also quoted directly in Practice Direction 8.82 of the Supreme Court Rules in relation to interveners), in which he stated:

> *It may however be of some assistance in future cases if I comment on the intervention by the [intervener in that case]. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will*

161 See Practice Direction 6.2.3 of the Supreme Court rules, which holds that "[t]*he Registrar will subsequently inform the parties of the date fixed for the hearing. The appellant and every respondent (and any intervener or advocate to the Court) "must then sequentially exchange their respective written cases and file them", and every respondent (and any intervener or advocate to the Court) must provide copies of their respective written cases to the appellant for the preparation of the core volumes: rule 22(4). (See paragraph 6.3 for cases).*" (Emphasis added). Similarly, Practice Direction 6.3.10 requires that "[n]*o later than 4 weeks before the proposed date of the hearing, the respondents must serve on the appellants a copy of their case in response and file at the Registry the original and 2 copies of their case, as must any other party filing a case (for example, an intervener or advocate to the court)…*"

enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention.

I am bound to say that in this appeal the oral submissions on behalf of the [intervener] only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way." (Emphasis added.)

This guidance is reflected in the new statutory costs regime which applies to interventions in the High Court and the Court of Appeal.

22.5 One way in which an intervener might ensure compliance with this guidance is through agreeing with the other parties in the appeal a timeline in which the written cases of the appellants and respondents would precede the filing of the written case of the intervener (as suggested above).

22.6 Different types of intervention include submissions on the law; on comparative or international experience; and/or the production of written or expert evidence on the issues before the court. You will therefore need to consider various strategic questions when drafting your intervention. For example:

(a) Are you making submissions on the law or the facts?

(b) Do you want the court to be aware of matters within the expertise of your organisation?

(c) Will you need to submit a witness statement in support of the assertions made in your intervention?

(d) Are you making submissions on comparative experiences of other courts?

(e) Will certified translations of foreign judgments or other materials be necessary?

(f) Is the material which you would like to put before the court proportionate to the value which it will add to the court's consideration of the case?

22.7 These questions will have different answers in every case. How you approach them will depend on a range of factors, not least the nature of your organisation, its resources and capacity and the scope of the intervention which you propose to make.

22.8 In order to make your intervention as effective as possible you should plan your submissions carefully from the moment permission to intervene is granted.

22.9 In any event, a general format for written submissions should follow a clear structure and should include the following features.

Introduction

22.10 The intervention should include an introduction which covers the following (some of which will be recycled from the intervention application):

(a) **The intervener**: provide a brief description of your organisation (in order to save space for your substantive arguments, this can simply be a synthesised version of the description

of your organisation included in your application). You will already have shown in your application what value you are able to add to the proceedings, so there is no need to provide any further information in respect of your specialist knowledge or expertise relevant to the issues raised, but it is worth re-iterating in your introduction the fact that you have been granted permission to intervene, and that the submissions should (if relevant) be read together with your application to intervene (and any supporting witness evidence provided with that application);

(b) **The scope of the intervention**: briefly reiterate 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;

(c) **The relevant law applicable to the intervention**: re-state with clarity what area of law your intervention will grapple with, including any relevant statutory underpinning which might be involved;

(d) **The order sought to accommodate the intervention**: again, this information is likely to have been given in your intervention application, but it is worth re-stating concisely what outcome you wish to see from the intervention, and invite the court to proceed accordingly. This will enable the court and the parties to understand where the intervention fits into the proceedings; and

(e) **Cross-referencing**: it is helpful to the court if you are able to provide cross-references to other information in the court's core bundle (such as the claim form, defence, court documents and, if possible, the skeleton arguments), as this does assist the judge(s) with their reading.

Factual context of the intervention

22.11 If relevant, including some brief background which provides some factual context for the intervention (i.e., why you are making the intervention at all), is a useful way to introduce the substance of your submissions. Questions to think about are:

(a) Why is this particular case important?

(b) What in your (the intervener's) experience enables you to add value to this case?

(c) Are there any pertinent studies or statistics which might help you describe this background?

22.12 Cases in which interveners become involved are often of great legal significance, and may address a variety of complex or novel issues. It is important to bear in mind that the intervener is not expected to deal with all of the issues in a case (nor would an attempt by the intervener to do so be necessarily well received by either the court or the main parties). Rather, total clarity on the issues to which the intervention relates is crucial, and will be appreciated by the court.

Key submissions

22.13 You should then systematically work through your submissions on the case, including any legal analysis of the points you wish to raise for the court's attention. Your submissions will obviously, represent the bulk of your contribution to the case, and it is where your assistance to the court may be at its most pertinent: you therefore must ensure that it is easy to follow.

22.14 There is really no magic to this other than following the general rule of thumb for legal drafting, answering the following:

(a) what is the relevant *law?*;

(b) what does that law *mean?*; and

(c) how does it *apply* to this case?

22.15 Every lawyer will approach the draft with their own particular drafting style. However, in light of the unusual position of the intervener, it is particularly important that the purpose of the submission is clearly signposted and the submissions made are pithy, direct and as economical as possible.

22.16 References to authorities must be clear and proportionate. If the parties introduce 10 or 15 authorities, the court may readily question whether an intervener should be permitted to introduce significantly more, for example.

JUSTICE maintains a bank of precedent submissions from its historical interventions on its website. Organisations and legal teams may find this a helpful resource in preparing their own submissions.[162]

Other practical issues to consider

22.17 Interveners often bring practical experience to court proceedings which, where properly harnessed, is of great assistance to the court. However, it is worth thinking carefully about how to demonstrate this practical experience.

22.18 For example, you might choose to submit evidence by way of a witness statement. In this instance, a question immediately arises as to who will give the statement. Whoever you choose (whether a director, a policy advisor/lead, or an independent expert), you should consider:

(a) whether that person has the expertise and authority to make the points you wish to convey to the court;

(b) who might need to be involved in preparing the statement alongside your legal team;

(c) the time it might take to produce the statement. So as to properly inform your legal submissions, a witness statement should be produced as early as possible in your intervention timeline; and

(d) on a practical note, whether the person giving the statement is going to be available to sign it. These practical issues should be handled with care and in good time, particularly where multiple organisations are working together on a joint intervention (see above).

22.19 While the purpose of the witness evidence should be simply to buttress the points made in your submissions by grounding them in some factual context, the other parties may attempt to resist the statement being admitted if they feel that it goes outside the scope of the basis on which you were granted permission to intervene. While you should ensure that the statement does not try to introduce 'new' evidence 'through the back door' (which could lead to additional work needing to be done by the other parties and, at worst, incur costs risk for you), one way to head this off at the outset is to inform the other parties and the court of your intentions, setting out briefly what the statement will cover and why it is necessary.

22.20 You may also wish to rely on material from other jurisdictions in order to conduct a comparative analysis. This could be introduced, for example, by way of an annex to your written submissions or as part of them, if necessary. In most cases, an intervener will already be aware of the relevant comparative material available. However, if not, then the analysis should be compiled as early in the process as possible and ideally before permission is sought.

162 See http://justice.org.uk/our-work/third-party-interventions/.

Proceeding with an application without a full picture could lead to difficulties later in the process. If comparative material is ultimately unhelpful, this could undermine the value of an intervention and could incur a costs risk if the material is irrelevant to the issues in the case.

22.21 You may need to consider other issues involved in comparative analysis, such as getting advice or material from foreign jurisdictions translated: be sure to plan for this early in the process, both in terms of the time official translation may take and the costs it is likely to incur.

Appropriate remedy / conclusions

22.22 Your submissions should conclude with a brief statement of what you actually want the court to do in reaction to your intervention.

22.23 Cases with an EU law dimension, the conclusion also provides the opportunity to suggest to the court that it should exercise its discretion to refer the case to the CJEU pursuant to Article 267 TFEU (although whether or not you, as intervener, choose to pursue this cause of action will depend on a variety of important strategic considerations).

'Nuts and bolts'

22.24 As with any piece of litigation, there are a variety of procedural requirements an intervener should observe when preparing and filing its submissions, including in relation to the formatting and presentation of submissions and supporting bundles.

22.25 While many of these requirements are governed by specific rules or guidance (for example, the Supreme Court Rules and accompanying practice directions), there are, in practice, a few points of 'good practice' which we have highlighted below. While very few of these are 'hard and fast' obligations, we consider that they make life easier for the court and the court registry, as well as the other parties involved in the case.

Don't forget:

(a) **Formatting:** the Supreme Court Rules[163] and PD 5A[164] provide guidance on formatting requirements for written submissions. If you are in the Supreme Court, remember the rule of thumb set out at Rule 6.1.1, that *"[w]here parties are in any doubt as to how documents should be presented they should consult the Registrar and discuss the practice which should be adopted."* There are several explicit requirements which do need to be borne in mind, as stipulated in paragraph 6.1.2 (for the Supreme Court) and Rule 2.2 of PD 5A (for proceedings in lower courts).

(b) **Avoid duplication:** try not to duplicate materials which have already been provided to the court. The intervener should instead work with the other parties in the production of an index for the court's bundle so as to ensure copies of cases, correspondence etc. does not appear more than once.

(c) **Length of submissions:** in terms of length of the submissions, Supreme Court Rule 6.9.4 requires that these do not exceed 20 pages of A4 size (which should act as a guide for interventions in other courts, unless otherwise stipulated by the court). If your permission stipulates you should make a submission of a specified length, you should, of course, respect that direction.

(d) **Get Counsel's signatures:** The Supreme Court rules and PD 5A require the signatures of the counsel who drafted the submissions.

(e) **Filing/exchange:** under Supreme Court Rule 6.3.10, interveners must file their submissions (the original plus two copies) at the same time as the respondents (i.e., 4 weeks before the proposed date of the hearing) (usually subject to any other agreement).

As a practical point, you should bring a further copy to the Registry and ask them to stamp it as evidence that it has been properly submitted. In addition, a further ten copies of the submissions should be provided to the appellants to enable them to file the core volumes (pursuant to Rule 6.3.11). In other courts, the main parties to proceedings should follow the guidance contained in CPR 54A 15.1–15.3.

163 Available at https://www.supremecourt.uk/procedures/practice-direction-06.html#09.

164 Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05a.

(f) **Court Bundle:** in general, the key point to bear in mind when preparing the Court Bundle (on which it is incumbent on the appellant to produce) is communicating effectively with the other parties.

The appellant will circulate (hopefully well ahead of the deadline for filing the bundle) an index of all authorities and materials proposed to be included in the bundle. At this stage you will have an opportunity to add any materials or authorities you seek to rely on in your intervention which have not already been included. As for the constitution of Court Bundle itself, basic common sense as regards what should reasonably be included in the Bundle is paramount.

In situations where permission to intervene is sought (or granted) late in the proceedings, and where the main bundle has already been agreed between the parties and to seek to include any materials you are relying on would cause disruption, for the convenience of the court and the other parties, the intervener can simply produce a separate, standalone 'Supplementary Bundle' of materials and file this at court.

The court and the other parties should be notified of your intention to take this course of action.

Electronic bundles are increasingly used in court proceedings in the UK. For hearings in which electronic bundles are to be produced, any intervener will usually be expected to make efforts to have their written case, supporting documents and authorities included.

The process of collating and producing the bundles will be undertaken by a third party e-services provider. You should obviously try to liaise with the other parties and the e-services provider as early as possible in order to ensure you are kept abreast of all relevant deadlines for submitting documents.

(g) **Supplementary submissions:** if legislative or case-law developments mean that your submissions have become slightly outdated, or could be improved by reference to a recent judgment, you may wish to write to the court to request its permission to update your submissions by way of 'supplementary submissions/ observations', so as to ensure you are effectively assisting the court by keeping it appraised of all relevant law.

PART C: CONCLUSIONS AND OBSERVATIONS

23. Conclusions and observations

23.1 This Guide was prepared to help civil society organisations and their lawyers understand the purpose, value and conduct of third party interventions in the public interest.

23.2 Practice in the courts across the UK and Europe since 2009 has confirmed the value that public interest organisations can bring to litigation where their expertise and experience may assist the court.

23.3 While recent reforms in England and Wales have focused on abuse of process by interveners, there is very limited evidence that abuse is a widespread problem. Indeed, charities and not-for-profit organisations at their own cost have pursued interventions in the public interest which the senior judiciary has welcomed as helpful and important.

23.4 At the same time, recent changes in the law in England and Wales and a public debate on the role and value of an intervener in Westminster have created an opportune moment to consider how the process of intervention in each of the three jurisdictions of the UK and at the CJEU might be improved, including by explaining clearly the role and function of the responsible intervener. In Parts A and B of this Guide we have explored the challenges interveners face and suggested the means by which public interest interventions might be better equipped to assist the court.

23.5 Since the Civil Procedure Rules Committee is in the process of considering changes to the rules of court which apply to the conduct of intervention in England and Wales, we take this opportunity to highlight a number of factors that might help to ensure that responsible and reasonable third party interventions continue to assist judges determine some of their most legally difficult and publicly significant cases.

23.6 Firstly, JUSTICE believes that greater clarity on the application of the new statutory rules on costs is needed, to ensure that those rules will only bite upon abusive behaviour in practice. Without such legal certainty, we are concerned that otherwise responsible interveners unlikely to face a costs risk will be unduly deterred by an uncertain and difficult-to-ascertain threat of financial detriment.

23.7 Secondly, as in Northern Ireland and Scotland, a new Practice Direction dedicated to the conduct of an intervention could prove exceptionally valuable in England and Wales. Reflecting the more detailed guidance in the Supreme Court Rules, a Practice Direction for intervention in the Court of Appeal and before the Administrative Court could give significant reassurance to prospective interveners on the likelihood and scale of the risk posed by any offer to assist the court. For example, a Practice Direction could outline the information to be provided by a prospective intervener at the application for permission stage and the process which an intervener might follow after permission is granted. It could deal with the treatment of costs in more detail and create a framework against which reasonable and responsible behaviour could be assessed.

23.8 Thirdly, while the rules vary across each of the jurisdictions of the United Kingdom, and again in the Supreme Court, a lack of clarity in the treatment of remission or waiver of fees may act as a significant deterrent to the pursuit of an intervention by a cash-poor charity or not-for-profit organisation.

23.9 It remains very much within the gift of the court to grant permission only in those cases where there is a genuine public interest, to determine the scope of that permission, and to punish any abuse by an individual intervener. Against this background, there is a case to revisit the approach of the courts to waiver or remission of fees for public interest interventions. There is, in JUSTICE's view, a strong argument for all courts to adopt and affirm the guidance of the Supreme Court, that charities and not-for-profit organisations might be permitted a waiver of fees in the public interest. If an intervention is truly in the public interest, and the intervener is meeting their own costs to assist the court, the requirement to pay a substantial fee can act as a disproportionate deterrent.

23.10 Fourthly, better provision of online information about cases progressing through the senior courts would significantly improve awareness of on-going challenges and the potential for litigation in the public interest. While both the Supreme Court and the ECtHR have taken significant steps since 2009 to improve the accessibility of information provided online, including through case summaries, this information is often only published at a late stage. Summaries of judicial review cases in the Administrative Court and the Upper Tribunal, and cases in the Court of Appeal could helpfully be published soon after the case is lodged with the court.

In England and Wales, the review of civil courts being conducted by Lord Justice Briggs, will include the examination of the operation of justice online. It would be timely for part of this process to address the accessibility of information about cases pending. Similar steps towards transparency in Northern Ireland and Scotland should be encouraged.

23.11 At the ECtHR improved processes for the notification of communicated cases by country are welcome. However, a new process to highlight cases which involve interventions by third party Contracting States would help raise the profile of cases likely to involve a significant public interest element.

23.12 Notwithstanding significant recent change to the legal landscape, JUSTICE considers that organisations with expert and front line experience will not be deterred from continuing to act to assist the court in the administration of justice for all. We hope that this Guide will help support continued responsible and reasonable interventions in future.

ANNEXES

Index of Precedents for an application to intervene

Number	Description of Document
A	Letter to other parties in support of application to intervene
B.1	Cover letter to the Court of Appeal
B.2	Application Notice for Court of Appeal (Civil Division) (Form N244)[165]
B.3	Draft Order for an application to intervene

Please note: *the following precedents are based on real-life applications to intervene in proceedings made by JUSTICE, but the content has been adapted to apply to the Green Action case study – all names and details are fictional. The example wording setting out the expertise of Green Action is provided purely for demonstration purposes and may not be applicable in the case of the specific intervener being represented.*

Real-life examples of written submissions and other useful materials taken from cases in which JUSTICE has intervened are available on the JUSTICE website, at http://justice.org.uk/our-work/third-party-interventions/.

165 Note: there is no prescribed application form for the Court of Appeal (Criminal Division) or the Appeals Tribunal.

(A) LETTER TO OTHER PARTIES IN SUPPORT OF APPLICATION TO INTERVENE

Fred Lister
Richards and Sons LLP
21 Sherwood Lane
London
SW3 7GT

FAO Janet Jason

Greenton Shopping Mall
Greenton
GR6 9EL

By Email and Post

11 February 2016

Dear Sirs

R (on the application of Jason) v Greenton City Council

We write to inform you that our client, Green Action, intends to seek leave to make a third party intervention in the above case before the Court of Appeal. We are currently finalising our client's application for leave to intervene and shall forward a copy to you in due course.

Green Action's expertise as an intervener

Green Action is a registered charity and law reform organisation. It works to promote the protection of the environment through research and education, analysis and commentary, and interventions in the courts. Green Action has extensive experience in intervening in domestic and international cases involving important environmental matters. Recent interventions included the cases of ***R (on the application of Jones) v Leicester City Council*** and ***R (on the application of Henderson) v Brighton & Hove City Council.*** Thus, Green Action is well placed to assist the Court of Appeal in the consideration of, and has a direct interest in, the important issues in this case.

Nature of Green Action's proposed submissions

Green Action wishes to participate in these proceedings as a third party intervener in order to assist the Court with information about (i) statistics on the environmental and public health advantages of pedestrianisation and (ii) the legal arguments based on emerging international jurisprudence on the protection of the environment as a human right. Green Action intends to complement, and not replicate, the submissions of the main parties to these proceedings. Green Action will not present arguments on behalf of either of the parties to the appeal and will remain strictly within the bounds of the permission granted by the Court.

Green Action will seek permission to present written submissions to the Court to assist the Court's determination of the case. Please also note that Green Action seeks permission to make oral submissions (of limited duration) in addition to written argument. We should be grateful if you could inform us of whether your client would be prepared to consent to an intervention by Green Action in these proceedings by 19 February 2016. In the event that your client is not prepared to give consent please could you provide a brief explanation of the reasons for refusal.

Costs

If permission is granted, Green Action will bear its own costs and has retained counsel and this firm to act pro bono to assist in the preparation of its proposed intervention.

As a charity and not-for-profit organisation with limited funds, our client is understandably concerned about the possibility of a costs order being made. We note that the Court will not ordinarily award costs in favour of, or against, an intervener. As such, we would also ask for an undertaking that your client will not seek costs against Green Action as intervener. For its part, Green Action undertakes that it will not seek costs against any party, and further will bear costs associated with the printing of additional materials required by its intervention, should permission be granted.

We would appreciate your urgent consideration of this letter, and a prompt response in writing.

Yours sincerely

Richards and Sons LLP

(B.1) COVER LETTER TO THE COURT OF APPEAL

Fred Lister
Richards and Sons LLP
21 Sherwood Lane
London
SW3 7GT

Civil Appeals Office
Room E307
Royal Courts of Justice
The Strand
London
WC2A 2LL

By Email and Post

22 February 2016

Dear Sirs

R (on the application of Jason) v Greenton City Council

We act for Green Action on a pro bono basis in connection with its proposed intervention in the above referenced proceedings. Please find enclosed the application for permission to intervene of our client, Green Action, in respect of the above proceedings, by way of oral and written submissions.

The application consists of the requisite form supported by a witness statement of Graham Young, Director of Green Action, a draft order prepared to assist the Court and the requisite fee.

The present application is made with the consent of the Appellant in this case. The Respondent has not consented to this application on the grounds that Green Action's intervention will unnecessarily broaden the remit of the case, causing the other parties to incur unnecessary costs. Green Action contests this, on the basis that (i) for the reasons set out in the witness statement of Graham Young, including its expertise in matters relevant to these proceedings and its extensive experience in intervening in domestic and international cases involving important environmental matters, Green Action is uniquely well-placed to assist the court; (ii) Green Action's submissions will complement, and not replicate, the submissions of the main parties to these proceedings; and (iii) Green Action seeks permission to intervene only by way of written submissions and limited oral submissions, minimising any potential costs burden on the other parties.

Relevant correspondence with the parties to these proceedings regarding the issue of consent to our client's proposed intervention is duly enclosed with the application. The present application and supporting evidence will be served on the legal representatives of the Appellant and of the Respondent.

In the event that the permission to intervene is granted, Green Action requests that such permission be granted on the basis that it will neither seek nor be required to pay costs, on the grounds that Green Action is, for the reasons set out in the application enclosed, uniquely well placed to assist the Court on the issues which it seeks permission to address, is able to bring a wider perspective to bear on those issues than any one party to the proceedings and has substantial experience and expertise on the issues before the Court.

Please note that Green Action is a registered charity with limited funds, seeking to make submissions in the public interest. Its counsel and solicitors are all acting pro bono. We hereby request remission of the required application fee in this matter.

I should be grateful if you would contact me directly at fred.lister@richardsandsons.com in the event that the enclosed form does not comply with the requisite formalities.

Yours faithfully

Richards and Sons LLP

(B.2) APPLICATION NOTICE FOR COURT OF APPEAL (CIVIL DIVISION) (FORM N244)

In the Court of Appeal (Civil Division

Application notice

For help in completing this form please read the notes for guidance form N244 Notes

Claim no.	
Fee Account no.	
Warrant no. (if applicable)	
Claimant's name (including ref.)	Janet Jason
Defendant's name (including ref.)	Greenton City Council
Date	22 February 2016

1. What is your name or, if you are a legal representative, the name of your firm?

Richards and Sons LLP

2. Are you a ☐ Claimant ☐ Defendant ☐ Legal Representative

☐ Other *(please specify)*

If you are a legal representative whom do you represent?

Green Action

3. What order are you asking the court to make and why?

For the reasons identified in the enclosed Witness Statement of Graham Young, Director of Green Action, an order that:

(1) the Applicant is granted permission to intervene in these proceedings by way of written and oral submissions;

(2) the Applicant will bear its own costs of the intervention; and

(3) no order as to costs shall be made in favour of, or against, the Applicant as a third party intervener.

These appeals are presently set down for hearing on 14 March 2016, and as such the Applicant respectfully requests prompt consideration of this Application.

4. Have you attached a draft of the order you are applying for? ☐ Yes ☒ No

5. How do you want to have this application dealt with?

☐ at a hearing ☒ without a hearing

☐ at a telephone hearing

6. How long do you think the hearing will last? ☐ Hours ☐ Minutes

Is this time estimate agreed by all parties? ☐ Yes ☐ No

7. Give details of any fixed trial date or period: 14 March 2016

8. What level of Judge does your hearing need?: Judge of the Court of Appeal

9. Who should be served with this application?: Appellant and Respondent

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

Appellant:
Elaine Graham
Greenton City Council
Greeton
GR3 7QD

Respondent:
Janet Jason
Greenton Shopping Mall
Greenton
GR6 9EL

10. What information will you be relying on, in support of your application?

Tick appropriate box

☒ the attached witness statement

☐ the statement of case

☐ the evidence set out in the box below

If necessary, please continue on a separate sheet.

Only complete this section if you are <u>not</u> submitting a witness statement or statement of case with the application.

Statement of Truth

The Statement of Truth will need to be filled in only where evidence submitted in support of the application is contained in this application notice. It should be signed by the person giving the evidence; this will usually be the applicant or an authorized representative of the applicant.

If a solicitor is instructed to sign the statement of truth on behalf of the applicant, this section should read "The applicant believes" and be signed by the solicitor making the application in his or her own name and the area below the signature space crossed out to read "Applicant's solicitor". The position held by the signatory (partner, associate) should be inserted in the space indicated for this purpose.

(I believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed _____ Dated

Applicant('s legal representative)('s litigation friend)

Full name

_____

Name of applicant's legal representative's firm

_____

Position or office held

_____

(if signing on behalf of firm or company)

11. Signature and address details

Signed Fred Lister Dated 22 February 2016

Applicant's legal representative

Position or office held
Partner

_____

(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

Richards and Sons LLP
21 Sherwood Lane
London

Postcode

S	W	3	7	G	T

If applicable	
Phone no.	0207-xxx-xxxx
Fax no.	0207-xxx-xxxx
DX no.	
Ref no.	FL/RAS 123456-7890

E-mail address	fred.lister@richardsandsons.com

(B.3) DRAFT ORDER FOR AN APPLICATION TO INTERVENE

CASE NO: 2016/8934/B

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT : CO/1547/2015

BETWEEN:

GREENTON CITY COUNCIL

Appellant

-and-

JANET JASON

Respondent

-and-

GREEN ACTION

Proposed Intervener

[DRAFT] ORDER

UPON AN APPLICATION made by Application Notice dated 22 February 2016 for permission to intervene in these proceedings

AND UPON READING the witness statement of Graham Young, Director of Green Action, dated 22 February 2016.

IT IS ORDERED that:

(1) the Applicant is granted permission to intervene in these proceedings by way of written and oral submissions;

(2) the Applicant will bear its own costs of the intervention; and

(3) no order as to costs shall be made in favour of, or against, the Applicant as a third party intervener.

Dated this_____ day of _____

ACKNOWLEDGMENTS

JUSTICE is grateful to all the individuals, organisations, chambers and firms that have assisted with its third party interventions over the years. Since 2009, these have included Zahra Al-Rikabi, Nick Armstrong, Alex Bailin QC, Henry Blaxland QC, Paul Bowen QC, Fraser Campbell, Eddie Craven, Martin Chamberlain QC, Anita Davies, Tom de la Mare QC, David Emanuel, Ben Emmerson QC, Shaheed Fatima QC, Michael Fordham QC, Alex Gask, Tom Hickman, John Howell QC, Ben Jaffey, Oliver Jones, Helen Law, Maya Lester QC, Alison Macdonald, Eric Metcalfe, Aidan O'Neill QC, Tim Otty QC, Lord Pannick QC, Alison Pickup, Nigel Pleming QC, Simon Pritchard, Dinah Rose QC, John Scott QC, Iain Steele, Mark Summers, Aaron Watkins, Andrew Westwood; Blackstone Chambers, Brick Court Chambers, Doughty Street, Garden Court Chambers, Maitland Chambers, Matrix Chambers, Monckton Chambers, 39 Essex Street, Allen & Overy LLP, Baker & Mackenzie LLP, Bindmans LLP, Capital Defence Solicitors, Clifford Chance LLP, Freshfields Bruckhaus Deringer LLP, Herbert Smith Freehills LLP, Kirkland & Ellis International LLP, Peters & Peters LLP, Taylor Kelly Solicitors, White & Case LLP.

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This Guide builds on the JUSTICE Report ***To Assist the Court,*** first published in 2009 and authored by Dr Eric Metcalfe (Monckton Chambers). It was produced under the management and supervision of Angela Patrick, Director of Human Rights Policy at JUSTICE. JUSTICE would particularly like to thank Ciar McAndrew, JUSTICE Fellow, and Daniella Lock, JUSTICE policy intern, for their work on this publication.

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