

RIGHTS WATCH UK

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Dear Joanne McDermott,

Submission to the Consultation of the Office of the Lord Chief Justice on the Draft Practice Direction on Third Party Interveners

Rights Watch UK (formerly British Irish Rights Watch) has the following mission, expertise and achievements:

Mission

Promoting human rights and holding governments to account, drawing upon the lessons learned from the conflict in Northern Ireland.

Expertise and Achievements

Since 1990 we have provided support and services to anyone whose human rights were violated as a result of conflict. Our interventions have reflected our range of expertise, from the right to a fair trial to the government's positive obligation to protect life. We have a long record of working closely with NGOs and government authorities to share that expertise. And we have received wide recognition, as the first winner of the Parliamentary Assembly of the Council of Europe's Human Rights Prize in 2009 alongside other honours.

Introduction to the Submission

We welcome the opportunity to respond to the Consultation of the Office of the Lord Chief Justice on the Draft Practice Direction on Third Party Interveners.

RWUK has acted as a third party intervener on human rights grounds in several cases through both written and oral submissions. These include, most recently in the higher courts in Northern Ireland, *Duffy (Colin) and Others Application (No. 2)* [2011] NIQB 16 (before Morgan LCJ on the length of pre-charge detention), *Arthurs (Brian and Paula) Application* [2010] NIQB 75 (before Girvan LJ on the right to trial by jury), *In the matter of an Application by Caoimhin Mac Giolla Cathain for Judicial Review*, [2010] NICA 24 (before Girvan LJ on the use of the Irish language in the courts of Northern Ireland).

As a charitable NGO we welcome the intention of the Lord Chief Justice to produce a Practice Direction clarifying and providing information on how to intervene as a third party in Northern Ireland. At present there is no clear procedure for making third party interventions under the Rules of the Supreme Court (Northern Ireland) 1980 and therefore this draft Practice Direction will serve as necessary assistance to those statutory and non-governmental organisations seeking to contribute their expertise to matters of public interest before the judiciary.

Method of Application

The Practice Direction should clarify the permissible methods of application for a third party intervener, whether by email, fax or post. An application by letter would avoid the formal Notice of Motion and attendant fee which might be a financial burden upon a charity or NGO when seeking to contribute arguments to the court in the public interest.

Pleadings

Access to pleadings in the application for judicial review must be made available to interested third party interveners. This will assist the intervener in determining whether to make a formal application to intervene, the nature of the intervention and the added value the intervention will make to the hearing. The process whereby pleadings by parties to the application are made available to possible third party interveners must be clearly specified.

Costs

In relation to costs, we note that paragraph 13 of the Practice Direction adopts the language of the Supreme Court Practice Direction 6, paragraph 6.9.6 (rule 46(3)):

Subject to the discretion of the Court, third party interveners bear their own costs and any additional costs to the other parties resulting from an intervention are costs in the appeal. Orders for costs will not normally be made either in favour of or against interveners but 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 applicant/plaintiff/appellant or respondent/defendant).

We are concerned that the issue of costs remains subject to judicial discretion. Although costs are very rarely awarded against the intervener in Northern Ireland, there is no guarantee that this will always happen and this has a potential chilling effect on third party interventions.¹

¹ See Tony McGleenan, Strategic Interventions in Public Interest Litigation: Practice and Procedure, PILS Project Seminar 10th May 2011, Para 22 available at <http://www.pilsni.org/Resources/Tony%20McGleenan's%20paper.doc>.

The value of third party interventions by NGOs in public interest cases has been expressly recognised by courts² and research reports: 'interventions can promote a better informed court which, in turn, enhances the legitimacy of the court's decision'.³

We believe that the Practice Direction should state that when a third party intervention is made in the public interest or interests of justice there ought to be a 'no costs presumption' for the interveners which may be rebutted if the intervention is deemed vexatious. This is in line with the equality of arms principle. While litigators are better able to bear the costs of litigation, third party interveners are often charitable NGOs with limited funding and should not be vulnerable to costs for interventions which are clearly in both the public interest and in the interests of justice.

We also suggest that the Practice Direction explicitly recognise the availability of Protection Costs Orders as set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 and applied in this jurisdiction in *Thompson* [2010] NIQB 38.

Yours Sincerely

RWUK

² See Sedley LJ in *Roe v Sheffield City Council* [2003] EWCA Civ 1 at 84.

³ See and Public Law Project, *Third Party Interventions in Judicial Review: An Action Research Study*, 2001 available at: <http://www.publiclawproject.org.uk/downloads/ThirdPartyInt.pdf> and Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on intervention in public interest cases*, 1996 available at: <http://www.publiclawproject.org.uk/downloads/PublicInterest.pdf>.