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Access to Intervene: The Northern Ireland Human Rights Commission and the Northern Ireland Act 1998

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The article explores the issue of access to make human rights interventions in legal proceedings by first exploring the House of Lords judgments in Re Northern Ireland Human Rights Commission, where the appeal was allowed, and their contrasting approach in Robinson v Secretary of State for Northern Ireland. It proceeds to consider the effect that the determination of the Northern Ireland Human Rights Commission's ("NIHRC") role has had on the debate to establish a UK-wide Human Rights Commission, looking at the recent findings of the Joint Committee on Human Rights, the Scottish Executive's introduction of a consultation paper and the potential influence of the above on the Government's decision on whether to establish a Commission for the United Kingdom. It then examines examples of bodies making third party and amicus curiae interventions and the impact of these interventions.

Introduction

In *Re Northern Ireland Human Rights Commission*² the House of Lords held that the Northern Ireland Human Rights Commission ("NIHRC") could intervene in legal proceedings to make submissions where human rights principles need to be raised, if permitted or invited to do so by the courts. In doing so, the House of Lords, by a majority of four to one,³ overruled the Northern Ireland Court of Appeal's earlier ruling⁴ which upheld the coroner's decision that the NIHRC had no power to intervene to make submissions raising relevant human rights arguments.

¹ Many thanks to Professor Stephen Livingstone, Dr Gordon Anthony, Dr Rachel Murray and Ms Lisa Glennon for their helpful comments on an earlier draft. The quotations from the interviews are part of an 18-month project funded by the Nuffield Foundation evaluating the NIHRC with comparative reference to the South African Human Rights Commission. I am grateful to those interviewees (Professor Brice Dickson, Angela Stevens and Rosemarie McIlwhan) who not only allowed me to use the quotations from the project I am working on with Stephen Livingstone and Rachel Murray but also provided me with useful information. Thanks also to Ms Andrea Loux. All errors are of course mine.

² [2002] UKHL 25; [2002] N.I. 236.

³ Lord Slynn of Hadley, Lord Woolf, Lord Nolan, Lord Hutton, Lord Hobhouse of Woodborough dissenting.

⁴ *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2001] N.I. 271, Kerr J. dissenting.

The case is important for five reasons. First, the NIHRC has the “capacity” not the power to act as a third party in cases raising human rights principles. Secondly, the judicial reasoning is an interesting example of different approaches to statutory interpretation. Thirdly, the judgment suggests a willingness on the part of the courts to acknowledge that the language and concept of human rights is an integral part of the legal system, and to acknowledge the vital role the NIHRC can play in ensuring that the courts apply human rights principles properly. Fourthly, the significance of the case extends beyond the role of the NIHRC. In light of the current debate to establish a UK-wide Human Rights Commission, the judgment is particularly significant and represents a powerful argument in favour of such a body, as the House of Lords recognises the important role a Human Rights Commission can play in developing a human rights culture. Finally, the decision leaves many questions unanswered. Where does the ruling leave the relationship between the NIHRC and the courts? What impact will the NIHRC’s intervention, if permitted by the court, have on judicial decision-making? What criteria will the court use to allow such interventions?

The first section of this article examines the juridical techniques employed by the Lords in interpreting the NIHRC’s role and powers and the effect of the judgment on the ongoing debate as to whether a UK-wide Human Rights Commission should be established. The remainder tries to answer some of the questions posed by this decision by referring to instances where bodies have made third party interventions and their impact on courts’ decisions. The article concludes on a cautious note by reiterating that whilst it is a qualified victory for the NIHRC, as it has the “capacity” not the explicit power to intervene, it is a welcome judgment as the majority of the House of Lords recognised the overall importance of the NIHRC’s role in promoting awareness and understanding of human rights.

Background

The NIHRC was one of the two institutions⁵ that was agreed by the Belfast/Good Friday Agreement (“the Agreement”) and given an overall function to promote and protect human rights.⁶ Under the Northern Ireland Act 1998 (“NIA”), the constituting legislation of the Agreement,⁷ the NIHRC has a number of statutory powers and functions. Under s.69 of the NIA the NIHRC has a duty to “keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights”. This statutory obligation requires the NIHRC to advise the Northern Ireland Office (“NIO”), the Northern Ireland Assembly, and other government departments on human rights matters related to Northern Ireland.⁸ The NIHRC is also under a statutory obligation to promote awareness of human rights⁹ and in this respect the NIHRC can provide assistance for research and educational

⁵ Strand Three, para.3. The other institution is the Equality Commission for Northern Ireland. See C. McCrudden, “Mainstreaming Equality in the Governance of Northern Ireland” [1999] 22 F.I.L.J. 1696.

⁶ For further information on the NIHRC see S. Livingstone, “The Northern Ireland Human Rights Commission” (1999) 22 F.I.L.J. 1465 and B. Hadfield, “The Human Rights Commission and the Civic Forum in the Devolved Northern Ireland” (2001) E.P.L. 143.

⁷ See B. O’Leary, “The Nature of the Agreement” (1999) 22 F. I. L.J. 1628.

⁸ s.69(2), (3), (4), and (7).

⁹ s.69(6).

activities. Regarding litigation, the NIHRC can assist individuals involved in proceedings that raise human rights issues and can also bring proceedings related to the law or practice in Northern Ireland.¹⁰ In its protective role, the NIHRC is also empowered to conduct "investigations as it considers necessary or expedient".¹¹

The core issue before the House of Lords was the nature and extent of the NIHRC's implicit powers under the NIA, in particular the breadth of the NIHRC's advisory role in promoting awareness and understanding of human rights. In deciding that Parliament did not intend to give the NIHRC power to intervene in legal proceedings, the House of Lords held that this is simply a *non sequitur*. The Lords held that even though the power to act as a third party is not explicitly stated in the NIA, the NIHRC does have the powers reasonably incidental to or consequential upon those which were expressly stated in the NIA.

Facts

The case arose out of an inquest held into the deaths of victims of a bomb explosion in Omagh on August 15, 1998. The NIHRC had written to the coroner stating that in light of the need to raise human rights arguments, the NIHRC should have the power to intervene. The coroner ruled on September 27, 2000 that the NIHRC had no statutory power to do so and he therefore could not permit such intervention. The NIHRC then unsuccessfully sought judicial review of this decision first in the High Court¹² and then from the Court of Appeal in Northern Ireland.¹³ The NIHRC then successfully appealed to the House of Lords.

Statutory interpretation and the NIA: the judgment

The House of Lords' broad and teleological approach is in stark contrast with the Court of Appeal's reticence. As a result of the Court of Appeal's more circumspect approach, they failed adequately to appreciate the centrality of human rights in the new legal order and the NIHRC's role in helping the courts in applying human rights principles. The language of the majority of the Court of Appeal suggests a certain degree of aloofness from both the changes brought about by the NIA and a reluctance to engage with the language and concept of human rights. Conversely the House of Lords acknowledged the challenge presented by the introduction of human rights into domestic law and the valuable role the NIHRC could play in helping to ensure that courts give proper effect to those rights. Rather than adopting the literal and legalistic

¹⁰ s.69(5(a) as read with s.70 and s.69(5)(b).

¹¹ s.69(8) and (9): "The Commission may decide to publish its advice and the outcome of its research and investigations."

¹² *Northern Ireland Human Rights Commission, In the Matter of* [2000] NIHEC, December 8, 2000.

¹³ See n.4 above. Sir Robert Carswell L.C.J. refused to overturn the coroner's ruling, supported by McCollum L.J. and Sir John MacDermott, Kerr J. dissenting. For further information on this case and other public law litigation on the NIA see G. Anthony, "Public Law Litigation and the Belfast Agreement" (2002) 8 E.P.L. 401.

approach of the Court of Appeal,¹⁴ the House of Lords adopted a purposive method of interpretation when determining the extent and scope of the NIHRC's powers under the NIA.¹⁵

Whilst the Lords did adopt a liberal and flexible approach in interpreting ss.69–70 of the NIA to read in an implied power to intervene in legal proceedings, they did not expressly recognise the constitutional status of the NIA and did not fully use the Agreement's values and objectives to shape their reasoning. This is in sharp contrast to the House of Lords' judgment in the *Robinson* case¹⁶ which was only decided a month later. Whereas the House of Lords in the *Commission* case couched their judicial reasoning on a liberal construction of the relevant sections of the NIA, the Lords in the *Robinson* case explicitly recognised the purpose and value of the Agreement and in this context it influenced their judgment. The NIA "is in effect a constitution. The provisions should with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."¹⁷

Whilst the House of Lords in the *Commission* case gave cognisance to the fact that the NIA was enacted in "particular sensitive circumstances"¹⁸ and the NIA is "for the

¹⁴ This traditionally has been associated with what is now called the modified *ultra vires* theory. See M. Elliot, *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001); "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" [1999] C.L.J. 129; "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review" (1999) 115 L.Q.R. 119. Though this model does not prevent the courts from interpreting or ascribing a meaning to a statute, so long as their interpretation is consistent with Parliament's intentions.

¹⁵ This is the view favoured by common law theorists who argue that courts should adopt a more purposive approach to legislation and interpret the statutes in their particular context in order to give them their true meaning. Even though this may result in courts reading into the relevant Act powers or functions of a public body which can be regarded as incidental to or consequential upon the powers which the legislature has expressly conferred. For further information see articles by P. Craig, N. Bamforth, Sir John Laws, Sedley L.J. in C. Forsyth, ed., *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000).

¹⁶ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] N.I. 390. This involved an appeal questioning the validity of the appointment of the First Minister and Deputy First Minister to the Northern Ireland Assembly, the new devolved legislature under the Agreement. The Assembly had been suspended when David Trimble resigned as First Minister due to refusal of the Provisional Irish Republican Army ("PIRA") to decommission their weapons. The Assembly was then restored in September 2001 and correspondingly necessitated fresh elections for a First Minister and Deputy First Minister. It was the validity of these elections on November 6, 2001 that a member of the Democratic Unionist Party questioned as they occurred two days after the period of six weeks as prescribed by s.16(8) of the NIA. For commentary on this case see M. Lynch, "Political Adjudication or Statutory Interpretation: *Robinson v Secretary of State for Northern Ireland*" (2002) 53 N.I.L.Q. 327.

¹⁷ *ibid.* at [11]. See also Lord Hoffmann's judgment: "The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast. The Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act" (at [25] and [33]).

¹⁸ See n.2 above, at [29] (*per* Lord Woolf).

purpose of implementing the Agreement",¹⁹ the principles and values of the Agreement were eclipsed by the heavy reliance on case law from the nineteenth and twentieth centuries on statutory interpretation. The NIHRC was referred to as "any corporation created by statute"²⁰ but clearly its importance transcends a corporation. As the then Secretary of State for Northern Ireland, Peter Mandelson MP, stated, "Northern Ireland is now transforming itself into a world leader in the protection and promotion of human rights". In referring to the NIHRC he said that it was "potentially a radical and ground breaking body. It is one of the key pillars of Northern Ireland's rights culture."²¹

On a more positive note the Lords did take on board the question of identifying the purpose for which the NIHRC was established by the legislature. In doing so it allowed Lord Slynn, in the leading judgment, to read into the NIHRC's overall advisory and educational functions the power, subject to the court's permission, to intervene. Rejecting the Lord Chief Justice's argument that s.69(6) was merely a "proselytising function" not an "advocacy function",²² Lord Slynn's approach²³ was to read s.69(6) disjunctively. His Lordship thereby recognised the dual role of the NIHRC, namely that of both promoting awareness of the importance of human rights and advancing understanding of human rights. Lord Slynn rightly identified the court as "the organ most concerned with the interpretation and enforcement of human rights law and practice".²⁴ To limit the NIHRC's advisory role to giving advice to the Secretary of State and the Northern Ireland Assembly regarding human rights and not being able to provide advice to the courts was illogical. By interpreting the explicit powers under s.69 holistically, the Lords acknowledged the benefit courts could gain from the NIHRC's intervention, even if this required interpreting this function as incidental to the NIHRC's main express duties or powers.

This judicial reasoning suggests a willingness of the courts to see themselves as an equal partner or organ in the ongoing process of evolving change in Northern Ireland. Rather than seeing themselves as standing apart from the other institutions and hesitating to embrace the NIHRC whose general task is to oversee the protection of human rights in Northern Ireland, the judgment also indicates an interest to engage with the new language and the new institutions of human rights created by the Agreement. The House of Lords' language and its recognition of the benefit of engaging with the NIHRC when interpreting and applying human rights principles, is in stark contrast with the majority view expressed by the Court of Appeal. McCollum L.J. questioned whether the NIHRC would have much to say which would assist the court in applying human rights principles and suggested that it would inevitably be partisan and support the party "whose human rights are strongest".²⁵ This lack of enthusiasm and myopic view that the application and protection of human rights lies

¹⁹ *ibid.* at [12] (*per* Lord Slynn).

²⁰ *ibid.* at [58] (*per* Lord Hutton).

²¹ International Conference on Democracy, Equality and Human Rights, Belfast, May 8, 2000, cited in NIHRC, Report to the Secretary of State Required by Section 69(2) of the Northern Ireland Act 1998 (NIHRC, Belfast, 2001), pp.4–5.

²² See n.4 above.

²³ Which mirrored that of Kerr J.'s judgment, see n.4 above, at [295]–[296].

²⁴ See n.2 above, at [21].

²⁵ See n.4 above, at [282]–[283].

principally with the judiciary was rightly replaced by the acknowledgment of the expertise and benefit that courts can gain from the NIHRC's intervention.²⁶

Dissenting judgment

Lord Hobhouse saw the matter quite differently.²⁷ He rejected the proposition that the courts have a duty to read into the NIA incidental powers which are reasonably implicit to the express statutory functions. After a meticulous examination of the statute including juxtaposing the different sections of the NIA and detailed reference to the Agreement, Lord Hobhouse's ruling was one of the most detailed judgments. He described the Agreement as a "unique constitutional document of both national and international significance". However he agreed with the majority of the Court of Appeal that by declining to be drawn into the extension of the NIHRC's powers the Lord Chief Justice and the majority of the Court of Appeal had "correctly understood the intent of the Belfast Agreement and the implementing legislation and their place in the constitutional framework of the Province".²⁸

I would respectfully suggest that this is part right, part wrong. It is part right in the sense that the NIA is a statute with obvious constitutional significance.²⁹ It is part wrong in the sense that his argument is vitiated by a misplaced assumption that because Parliament can authorise or prohibit anything, all authorities and prohibitions must come from Parliament. It neglects what Sir John Laws referred to as the "undistributed middle", meaning that although X and Y may be opposites, like praise and blame, they do not cover the whole field; there may be Z which involves neither.³⁰ By refusing to look beyond the express functions and read into those powers the capacity to intervene in cases where it is appropriate for the NIHRC to do so to raise human rights principles, it is respectfully submitted that Lord Hobhouse missed the "Z". His judicial reasoning is redolent with language of undue religious deference to Parliament, opining that "where the draftsman of the Act has wished to include incidental powers he has done so expressly, as he has done in subss.(8) and (9)" and continues "it is for him [the Secretary of State] to initiate the appropriate legislative

²⁶ See A. Loux, "Writing Wrongs: Third-party Intervention Post-Incorporation" in A. Boyle, C. Himsworth, A. Loux and H. MacQueen, eds, *Human Rights and Scots Law* (Hart Publishing, Oxford, 2002), p.341 where A. Loux argues that "the courts . . . must respond to the challenges to the legitimacy of judicial decision-making raised by their new role under the Human Rights Act. Interventions in human rights cases would reinforce the traditional function of the courts as an informed adjudicator and legitimate its new role as human rights legislator. In the process, interveners could contribute to the broader political project of 'bringing rights home'."

²⁷ See also Lord Hobhouse's dissenting judgment in the *Robinson* case, n.16 above.

²⁸ See n.2 above, at [68].

²⁹ For further information on how other devolved legislation, namely the Scotland Act 1998 and the Government of Wales Act 1998, can be interpreted see P. Craig and M. Walters, "The Courts, Devolution and Judicial Review" in C. Forsyth, ed., *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000), p.229. See also n.26 above where A. Loux considers the significant scope given to the judiciary as a result of the Human Rights Act to make choices about constitutional values and whether they are putting into effect the new rule of statutory interpretation.

³⁰ Sir John Laws, "An Extract from: Illegality The Problems of Jurisdiction" in C. Forsyth, ed., *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000), p.78.

steps".³¹ His reasoning mirrors the traditional approach to statutory interpretation, that the courts do not look far beyond the words of the statute they are interpreting. To do otherwise would undermine one of the fundamental postulates of the UK legal system, the Diceyan tenet of parliamentary sovereignty, which requires judicial obedience to the strict terms of the statute.³²

This issue of judicial obedience or restraint has been a recurring theme in the UK courts and also in many other countries, especially those which have adopted a Bill of Rights.³³ It stems from another perceived sacrosanct, albeit problematic doctrine in the UK Constitution, the separation of powers which is based on the separate relationships between the judiciary, the legislature and the executive. Again as literature on this doctrine is now legion,³⁴ it is not within the purview of this article to comment on this.

From an orthodox constitutional lawyer's point of view it would be anathema to pursue the purposive method of interpretation, but it has to be pointed out that this interpretative methodology is not peculiar to the construction of statutes. The UK courts have utilised what Sebastian Baer terms "the presumption of interpretation"³⁵ to address the issue expressly or by necessary implication to protect human rights at common law. The accumulative effect of European law in its EU form³⁶ and, with the

³¹ See n.2 above, at [70] and [71].

³² For further information on this doctrine see A.V. Dicey, *Introduction to the Study of Law of the Constitution* (9th ed., Macmillan, London, 1945). See also T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" [1985] C.L.J. 111. For a recent commentary on the Diceyan doctrine see Lord Bingham of Cornhill, "Dicey Revisited" [2002] P.L. 39.

³³ For an interesting account on the role of the judiciary see P. Joseph, "New Zealand's Bill of Rights Experience; A. Byrnes, "And Some have Bill of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights; Sir Gerard Brennan, "The Impact of A Bill of Rights on the Role of the Judiciary: An Australian Perspective"; R. Sharpe, "The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective" in P. Alston, ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999).

³⁴ See Lord Woolf, "Judicial Review—the Tension between the Executive and the Judiciary" (1998) 114 L.Q.R. 579; D. Woodhouse, "The Office of Lord Chancellor" [1998] P.L. 617; Lord Steyn, "The Weakest and Least Dangerous Department of Government" [1997] P.L. 84; L. Blom-Cooper, "Lawyers and Public Administrators: Separate and Unequal" [1984] P.L. 215; Sir David Williams, "Bias; the Judges and the Separation of Powers" [2000] P.L. 45; W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (3rd ed., Stevens, London, 1951).

³⁵ S. Baer, "Umpiring the Ping-Pong Game: The Courts and the legislative conflict between Edinburgh and Westminster" (2002) 1 J.R. 57.

³⁶ Most notably with the introduction of the doctrines of direct and indirect effect and their impact upon the relationship between UK statutes and EU directives requiring the courts to give effect to EU law. Regarding the former, Alan Boyle argues in "Sovereignty, Accountability, and the Reform of Administrative Law" in G. Richardson and H. Genn, eds, *Administrative Law and Government Action* (Clarendon Press, Oxford, 1994), p.91 that the two decisions of the House of Lords, namely *R. v Secretary of State for Transport Ex p. Factortame (No.2)* [1991] 1 A.C. 603 and *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1994] 2 W.L.R. 409 are among the most important constitutional cases in many years. Regarding the latter see *Webb v EMO Air Cargo (UK) Ltd (No.2)* [1995] 4 All E.R. 577. For further commentary on this doctrine see G. de Burca, "Giving Effect to E.C Directives (1992) 55 M.L.R. 215; C. Lewis and S. Moore, "Duties, Directives and Damages in European Community Law" [1993] P.L. 151; N. Gravells, "European Community Law in the English Courts" [1993] P.L. 44.

introduction of the Human Rights Act 1998,³⁷ coupled with the landmark decision in *Pepper v Hart*,³⁸ have altered "the historic notion of parliamentary sovereignty and consequently the role of the courts within our constitutional order".³⁹

The debate to establish a UK-wide Human Rights Commission

In light of the ongoing debate as to whether a Human Rights Commission should be introduced for the rest of the United Kingdom, the judgment is a cogent argument for those who have campaigned for the creation of such a body.⁴⁰ The House of Lords clearly recognises the important role the NIHRC plays in developing law and practice relating to the protection of human rights: "Submissions by the Commission as to how the human rights law should be interpreted and applied so as to be adequate and effective show how relevant is the work of the Commission to that of the courts".⁴¹ The case for a Human Rights Commission is even more pertinent given the recent findings of the Joint Committee on Human Rights ("JCHR") in their report where the JCHR concludes that the case for establishing a Commission is "compelling".⁴² In its White Paper, *Bringing Rights Home*,⁴³ the UK Government indicated that it was not yet convinced of the need for a Human Rights Commission and that it preferred to see whether the JCHR would recommend such an institution. Now that the JCHR has produced a voluminous report with concrete and overwhelming evidence of the need for such a body, it remains to be seen whether the UK Government will take on board the JCHR's recommendation and give full weight to its findings as promised.⁴⁴ If the

³⁷ Human Rights Act 1998, s.3 imposes a comparable interpretative obligation upon the courts. It requires courts to interpret all legislation, both primary and subordinate, whenever enacted, in a way which is compatible with Convention rights, "so far as it is possible to do so". For recent decisions on the effect of s.3 see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All E.R. 604 at 624 (*per Lord Woolf C.J.*); *R. v A (No.2)* [2001] 2 W.L.R. 1546 (*per Lord Steyn*) and *Re S (Children) (Care Order; Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 A.C. 291. For further information on the impact of s.3 on judicial interpretation and other thematic issues see the accompanying commentaries of C. O'Brien and J. Arkininstall, "Table of Cases Under the Human Rights Act: Commentary" [2002] E.H.R.L.R. 239; 357, 495.

³⁸ [1993] A.C. 593.

³⁹ A. Boyle, "Sovereignty, Accountability, and the Reform of Administrative Law" in G. Richardson and H. Genn, eds, *Administrative Law and Government Action* (Clarendon Press, Oxford, 1994), p.82.

⁴⁰ S. Spencer, I. Bynoe, *A Human Rights Commission: The Options for Britain and Northern Ireland* (IPPR, London, 1998); "A Human Rights Commission for the United Kingdom: Some Options" [1997] E.H.R.L.R. 152.

⁴¹ See n.2 above, at [21] (*per Lord Woolf*).

⁴² Vol.II of the Sixth Report from the Joint Committee on Human Rights, "The Case for a Human Rights Commission" (2003 HL 67-II, HC 489-II). The JCHR is appointed by the House of Lords and the House of Commons and part of its remit is to examine whether, following the passing of the Human Rights Act 1998, there is a need to establish an independent Human Rights Commission.

⁴³ *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997), paras 3.8 to 3.11.

⁴⁴ "The Government would want to give full weight to the Committee's report in considering whether to create a statutory Human Rights Commission in future" *ibid*. The government has produced a consultation paper *Equality and Diversity: Making it happen* (Cabinet Office, Department of Trade and Industry, Home Office and Department for Work and Pensions, October 2002) which considers options for establishing a single equality body and noted that the government's visions for equality and human rights are complementary and that this has implications for any

Government is still unconvinced of the need for a Human Rights Commission, dicta from the House of Lords' judgment are a powerful reminder to the Government of the key role a Human Rights Commission can play in enabling public bodies, including the courts, to create a human rights culture.⁴⁵

The call for such a body is ever more pressing given the fact that despite the introduction of the Human Rights Act 1998 in October 2000, it is arguable whether a human rights culture or mainstream respect for human rights in public bodies' policies and practices exists. A survey by District Audit found that the majority of local authorities and National Health Service Trusts had not reviewed their policies and procedures for compliance with the Human Rights Act and 42 per cent of health bodies had not even taken action to raise staff awareness.⁴⁶ Proponents who campaigned for the introduction of a Human Rights Commission when the Human Rights Act was introduced feared that the Human Rights Act's effectiveness would be limited. When earlier equality legislation was passed, statutory bodies such as the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission were set up to ensure that training was given and that individuals were ensured justice. Without such an agency to oversee its enforcement there is a concern that the Human Rights Act may remain poorly understood and inadequately implemented. These anxieties are proving to be well founded.

It is interesting to note that the Scottish Executive has introduced a consultation paper to establish a separate Scottish Human Rights Commission with all-party support.⁴⁷ One of the main reasons for establishing the Commission was the need to promote a human rights culture and awareness about the Human Rights Act. This is the view held by the Director of the Scottish Human Rights Centre:

"I think probably that was one of the main factors. I think that probably came from the feeling that when the Human Rights Act was passed it was somewhat lacking. Other similar pieces of legislation either had the Commission created at the same time or then shortly afterwards. Thinking of Sex Discrimination Act, we have got Equal Opportunities Commission, Race Relations Act we have the Commission for Racial Equality, so we felt that a Human Rights Act was lacking, as it was such a fundamental piece of legislation they needed a Commission to police it."⁴⁸

Third party intervention and *amicus curiae*

The position of an intervener either as a third party or as an *amicus* and their impact was also referred to in the judgment. The distinction is important as there is a difference between the conventional *amicus curiae* and a third party intervention. The former,

institutional support arrangements relating to these two areas. For commentary on this paper see S. Spencer, "Should the Single Equality Commission be able to protect human rights?", presented to a Justice seminar on the single equality body, November 2002.

⁴⁵ For further information on what contribution human rights commissions can make to the protection of human rights see B. Dickson, "The Contribution of Human Rights Commissions to the Protection of Human Rights" [2003] P.L. 272.

⁴⁶ District Audit, "The Human Rights Act. A Bulletin for Public Bodies", May 2002. See also n.42 above, pp.26-32.

⁴⁷ "The Scottish Human Rights Commission" (The Scottish Executive, February 2003).

⁴⁸ Interview with Rosemarie McIlwhan, Director of the Scottish Human Rights Centre.

which was known in Roman law literally as a "friend of the court", was described by Lord Slynn as "keeping within the limits of a non-partisan view of the particular case".⁴⁹ The dissenting Lord Hobhouse also noted that the powers to appoint *amici* are constitutionally to be exercised by the Attorney-General and the role of the *amicus curiae* is to assist the court impartially. The latter's role, which can be allowed or refused by the courts, is to act as an advocate, intervening "where there is a danger that an important principle of law favouring one party or the other has not been brought to the attention of the court".⁵⁰ Clarifying this demarcation is significant because it highlights that an *amicus curiae* presents information to a court at the court's invitation. Louis Blom-Cooper describes it as a "strictly court-induced method of getting required assistance".⁵¹ Whereas the application to intervene as a third party can be *rejected or permitted* by the courts.⁵² Furthermore, an *amicus curiae* has to address the court on all arguments relevant to the matter on which the court has required assistance. A third party intervener may apply to intervene to address the court on particular matters. As Hannett states, it is equally important "for maintaining the integrity of the *amicus curiae* process, but it also prevents a court from invok[ing] the device of *amicus curiae* in order to cloak in the 'ancient tradition' of the common law what is in fact a more radical innovation to the judicial process".⁵³

The point was also made by Lord Woolf that although the practice of allowing third parties to intervene has become more common in recent years, they are still a rarity due to the fact that it is at the court's discretion to invite the third party to intervene.⁵⁴ The floodgates argument, which was also referred to in the course of the judgment, is a legitimate institutional concern for the courts. However the issue did not give rise to consternation in this particular case as Lord Slynn said that as courts become more familiar with human rights principles, they may "find it less necessary" to rely on interventions by the NIHRC.⁵⁵

Although it is difficult to quantify the impact of third party interventions, one measure of their impact is judicial citation of their submissions.⁵⁶ It is interesting to note that written submissions of the NIHRC's predecessor, the Standing Advisory Commission on Human Rights (SACHR) have been referred to on a number of occasions. In the

⁴⁹ See n.2 above, at [24].

⁵⁰ *ibid.*

⁵¹ L. Blom-Cooper, "Third Party Intervention and Judicial Restraint" [2002] P.L. 602 at 604.

⁵² Lord Woolf stated that intervention will usually depend on whether it will promote the interests of justice and, in particular, whether the intervention will assist the court in its adjudication, see n.2 above, at [32].

⁵³ S. Hannett, "Third Party Intervention: In the Public Interest?" [2003] P.L. 128 at 133.

⁵⁴ For a different view see n.51 above where L. Blom-Cooper argues that where public law issues arise third party interventions are increasing. See also n.53 above where S. Hannett too concludes that the use of third party intervention is growing further.

⁵⁵ Indeed this has been the experience of the European Court of Human Rights. As its jurisprudence has grown, the court has refused third party submissions on the grounds that they are superfluous as similar issues have been decided in previous cases. See *Caleffi v Italy* and *Vocaturo v Italy* App Nos 11890/85 and 11891/85, judgment of May 24, 1991; *Modinos v Cyprus* (1993) 16 E.H.R.R. 485; *Dudgeon v UK* (1982) 4 E.H.R.R. 149.

⁵⁶ See JUSTICE/Public Law Project, *A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases* (London, 1996) and the follow-up research study by the Public Law Project, *Third Party Interventions in Judicial Review: An Action Research Study* (London, 2001).

important *Brogan*⁵⁷ case, the dissenting Judge Martens in the European Court of Human Rights discussed one of the issues raised in the case as commented by the SACHR. In another significant case *Brannigan and McBride v United Kingdom*,⁵⁸ the SACHR, alongside two other organisations filed submissions which were again referred to in the course of the judgment. These examples and others⁵⁹ illustrate that organisations with particular expertise can contribute significantly to the protection of human rights in the system. Granting the NIHRC the ability to intervene by reasonable implication from the express provisions of s.69(1), (6), (8) and (9), will help the courts in the protection and vindication of the human rights of all and help in promoting "Northern Ireland's rights culture".

Role of the NIHRC and the courts

Where does this decision leave the relationship between the NIHRC and the courts? Since the judgment, the NIHRC has intervened or is currently intervening in five cases.⁶⁰ Given the few interventions made by the NIHRC, it is difficult to give at this early stage a proper consideration of how the courts have reacted to the NIHRC's applications to intervene. As a member of staff for the NIHRC stated: "I couldn't say that the courts were guided by our intervention, but there are a number of points they take under consideration".⁶¹ It is instructive to note that before the decision to refuse the NIHRC's applications to intervene, the NIHRC during 1999 and 2000 successfully applied to intervene as a third party in four applications for judicial review in Northern Ireland and also in a group of cases before the European Court of Human Rights. Not only in those cases was there no dispute concerning the NIHRC's power to make such applications, but also the judges found the NIHRC's intervention helpful.⁶²

Hence there is no definitive answer to the question as to where the judgment leaves the relationship between the NIHRC and the courts. First and foremost, it will depend on whether the court wishes the NIHRC to make submissions and what criteria are used for granting such leave.⁶³ Secondly, the NIHRC itself must be cautious in deciding

⁵⁷ (1988) 11 E.H.R.R. 117.

⁵⁸ (1993) 17 E.H.R.R. 539.

⁵⁹ *Soering v United Kingdom* (1989) 11 E.H.R.R. 439; *Observer and Guardian v United Kingdom* (1992) 14 E.H.R.R. 153; *Sunday Times v United Kingdom* (1979-80) 2 E.H.R.R. 245; *Pham Hoang v France* (1993) 15 E.H.R.R. 63; *Open Door and Dublin Well Woman v Ireland* (1993) 15 E.H.R.R. 244. See also the cases decided by the Inter-American Court of Human Rights. For further information on the Inter-American system see T. Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 A.J.I.L. 1. In the course of Lord Slynn's judgment in the instant case, he too referred to the benefits of third party interventions: "Courts can gain much from such interventions as the House did in *R. v Kansal (No. 2)* [2001] 3 W.L.R. 1562", see n.2 above, at [24].

⁶⁰ *The Crown v Michael Markey*, Newry Crown Court, December 23, 2002; *Pauline Anderson v Ministry of Defence*, Industrial Tribunal, May 28, 2003, *In the matter of Paul McIlwaine re David McIlwaine (dec'd)*, NIQB, June 18, 2003. The NIHRC is currently seeking the parties' consent to intervene in two House of Lords cases, *In the matter of Imtiaz Amin*, *In the matter of Jean Middleton*, on the state's duty under Art.2 ECHR and the Coroner's Rules.

⁶¹ Interview with a member of staff from the NIHRC.

⁶² In the case of *Jordan v United Kingdom* (24746/94) 11 B.H.R.C. 1, the European Court of Human Rights found a violation of Art.2 ECHR and relied in part on the NIHRC's submission.

⁶³ For further information on where the decision in the NIHRC's case leaves the question of third party interventions see n.51 above, where L. Blom-Cooper claims it would have been

whether an intervention is absolutely necessary, and since the judgment it has changed its criteria to determine whether or not an intervention is essential.⁶⁴ Finally, the potential influence of third party interventions depends very much on whether judges are hospitable to the NIHRC's arguments.⁶⁵ Only then in this context will we see if the "capacity" to make submissions encourages and fosters "Northern Ireland's rights culture".

There are a number of comments which are subordinate or tangential to the major points, but which are nevertheless important to make. A number of non-governmental organisations—British Irish Watch, the Committee on the Administration of Justice and Amnesty International—together made third party submissions in support of the NIHRC's case. It would have been ironic if these non-governmental organisations could intervene in the judicial process but the NIHRC, a statutory body, could not. Equally ironic is that the NIHRC's sponsoring body, the NIO, whose relationship at times has been described as "it hasn't been as good as it might have been certainly",⁶⁶ gave special funding to allow the case to proceed. This is particularly important when one considers the problems the NIHRC has experienced in the past over the issue of resources. The NIHRC was given a budget of £750,000 in each of its first three financial years,⁶⁷ which was insufficient for it to carry out its mandate effectively. Though the NIHRC has received additional money through supplementary bidding with the NIO, as the Chief Commissioner of the NIHRC states, "there are examples of particular projects that we bid for last year that still have not been approved by the NIO more than a year later".⁶⁸ The NIHRC also had full backing from the Government in relation to powers of third party intervention, as the Government expressed that it would be willing to bring forward amendments to the NIA to make the powers explicit if the case failed in the House of Lords.⁶⁹ This begs the question as to why the Government did not, in the first place, when the NIA was being debated in Parliament, explicitly give the NIHRC the power to intervene.⁷⁰

helpful to know the criteria used for granting leave, as it is not clearly outlined in this case or other case law and argues that "guidance is eagerly awaited", pp.603–604.

⁶⁴ The casework criteria the NIHRC is presently using for intervention are "working criteria" as they have not yet been formally adopted by the NIHRC. They are awaiting Counsel's opinion before formally adopting the criteria.

⁶⁵ See n.26 above, where A. Loux examines third party intervention in the era post incorporation of the Human Rights Act 1998 in Scotland where the tradition of such interventions is a novel one.

⁶⁶ Interview with Brice Dickson, Chief Commissioner of the NIHRC.

⁶⁷ This figure was agreed, albeit arbitrarily, on the basis that SACHR's budget was £250,000 multiplied by three. The NIHRC received an additional £457,000 in the third year, mostly for its work on a Bill of Rights.

⁶⁸ Interview with Brice Dickson, Chief Commissioner of the NIHRC. The NIO has now agreed that the NIHRC's core budget will be raised to £1.3 million. Last year the budget was £1.3 million but this included supplementary bids. This core budget is fixed for two years and will rise to £1.5 million in the third financial year.

⁶⁹ The government's intervention was in response to a request by Brice Dickson that the government should intervene and support the case.

⁷⁰ The then Minister of State Paul Murphy's response to a proposed amendment to give the NIHRC the express power to act as an *amicus curiae* in a House of Commons debate asserted that it was unnecessary: "Courts will be free to allow the Commission to provide assistance as *amicus* under the normal rules that apply. However, that is not a matter for the Bill, but for the court in individual cases." *Hansard*, HC Vol.317, col.78 (July 27, 1998).

If we look beyond at the international plane, other Human Rights Commissions have the power to act as *amicus* and have intervened in a number of cases where courts have welcomed their input.⁷¹ It is interesting to note that the NIHRC's counterpart, the Irish Human Rights Commission, also has the power to appear as *amicus* under s.8(h) of the Human Rights Commission Act 2000.⁷²

Had the Government accepted the proposed amendment it would have saved the NIHRC from having to bring a costly and lengthy case in the first place, and from having to change the criteria it had already established to determine whether or not to intervene and which it had indeed used successfully in four cases prior to the coroner's decision. One lesson that has been learnt from the NIHRC's experience is that when Human Rights Commissions are established, but especially for one operating in as generally hostile an environment as is the case with the NIHRC, it is imperative from the outset to have specific and detailed statutory powers. Without these specific powers, state agencies and public authorities, including the courts, will not accept that such powers exist. There is a general debate about how, if at all, the statutory powers should be changed in the context of the s.69(2) review of the NIA.⁷³ In preparing the statutory review of its powers, an independent evaluation was conducted by a former member of the New Zealand Human Rights Commission, Peter Hosking, where he too agreed that the NIHRC should, amongst other powers, be granted the right to act as a third party intervener.⁷⁴ When the Government responded to the NIHRC's report after 15 months in the form of a consultation paper, only three out of the 25 recommendations made by the NIHRC were fully accepted without reservation or change from the form and method proposed by the NIHRC itself. The Chief Commissioner described the Government's response as "dismissive" and hoped that "the government will change its mind . . . but the signs are not good".⁷⁵

Before concluding, a noteworthy point is that other statutory bodies, such as the Commission for Racial Equality, the Equal Opportunities Commission and the Mental

⁷¹ Under s.7(1)(e) of the Human Rights Commission Act 1994 the South African Human Rights Commission can intervene on "behalf of a person or a group or class of persons". The Constitutional Court has welcomed the Commission's involvement: "As an *amicus curiae* it can be expected to play an important role, in appropriate circumstances, in the work of this Court." *Fose v Minister of Safety*, Case CCT 14/96, June 5, 1997, para.7. Other Commissions in Canada, New Zealand, India, Australia and Sri Lanka to name but a few can intervene as *amicus*.

⁷² It is important to note that whilst these Commissions have the power to intervene as an *amicus curiae*, whereas the NIHRC has the "capacity" to intervene as a third party, the analogy is nevertheless instructive for the purposes of illustrating how interventions can help the courts. For more general information on how other organisations play an increasing role in litigation as *amici curiae* see D. Shelton, "The Participation of Nongovernmental Organisations in International Judicial Proceedings" (1994) 88 A.J.I.L. 610.

⁷³ NIA, s.69(2) provides that the NIHRC must, before the end of the period of two years beginning with the commencement of the section, make to the Secretary of State such recommendations as it thinks fit for improving the NIHRC's effectiveness and the adequacy and effectiveness of the functions and provisions conferred on the NIHRC. See n.21 above on the NIHRC's review of powers.

⁷⁴ Peter Hosking, "The Northern Ireland Human Rights Commission: An Evaluation of its Powers, Effectiveness and Structure" (Auckland, New Zealand, April 2001).

⁷⁵ See n.45 above, p.283. In Annex 3 to the Joint Declaration of the British and Irish governments published on April 30, 2003 it is stated that the British government will not be able to come to a definitive view on the NIHRC's powers until devolution has been restored in Northern Ireland.

Health Act' Commission, have been allowed to intervene without specific statutory

Conclusion

It remains to be seen how often the courts will agree to third party interventions from the NIHRC in light of the ruling from the House of Lords that it is within the courts' discretion to allow or refuse the NIHRC's application to intervene. The important point, which is apposite to conclude on, is that at least the majority of the House of Lords and Kerr J. in the Northern Ireland Appeal Court, acknowledge that the courts do not exist in a vacuum and as such they too can benefit from the NIHRC's assistance when it comes to understanding and applying human rights principles. In doing so in this respect, they correctly understood their position; the courts are not just "guard dogs"⁷⁷ patrolling the boundaries set for Northern Ireland by Westminster, they are "independent and impartial arbitrators"⁷⁸ who have a wider institutional role to play in the evolving process of change in Northern Ireland. Rather than insulating themselves within a closed system of legal discourse bereft of the NIHRC's knowledge and expertise on human rights principles, by allowing the NIHRC the "capacity" to intervene in cases to raise human rights arguments, the Lords recognised the potential value the NIHRC can bring so as to "enable the courts to fully appreciate what is involved in properly applying human rights".⁷⁹

Equally important in the context of the wider UK debate, the acknowledgment by the highest court in the jurisdiction of the valuable role that the NIHRC can offer and provide to the courts is a forceful and authoritative argument for the establishment of a similar body for the United Kingdom. The Lord Chancellor in April 2002 told the JCHR that the Government's mind still remained open on the question of a Human Rights Commission, but he noted that it was not "sufficient simply to assert a need [for a Human Rights Commission]—you have to make a good argument, you have to promote a case".⁸⁰ The House of Lords' judgment, coupled with the JCHR's report, will hopefully help to influence the Government's decision as both present *prima facie* evidence of the need and advantages a Human Rights Commission can play in promoting an understanding of human rights.

⁷⁶ The Equal Opportunities Commission intervened in *Shields v E Coombes (Holdings) Ltd* [1978] 1 W.L.R. 1408 to explain the effects of EC law on the Sex Discrimination Act 1975. The Equal Opportunities Commission and the Commission for Racial Equality jointly intervened in the joined appeals in *Science Research Council v Nasse, Leyland Cars v Vyas* [1980] A.C. 1028. The Mental Health Act Commission intervened in *R. v Bournewood Community and Mental Health NHS Trust Ex p. L* [1998] 3 All E.R. 289 and *F v West Berkshire Health Authority* [1989] 2 All E.R. 545.

⁷⁷ See n.35 above, p.59.

⁷⁸ *ibid.*

⁷⁹ See n.2 above, at [34] (*per* Lord Woolf).

⁸⁰ Twenty-second Report, Session 2001–02, "The Case for a Human Rights Commission": Interim Report, (July 2002, HL Paper 160, HC 1142), Q.14.