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HOUSE OF LORDS

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House of Lords

# Judgments - In Re Northern Ireland Human Rights Commission (Northern Ireland)

## HOUSE OF LORDS

Lord Slynn of Hadley Lord Woolf Lord Nolan Lord Hutton Lord Hobhouse of Wood-borough

### OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

#### IN THE CAUSE

*IN RE NORTHERN IRELAND HUMAN RIGHTS COMMISSION*

*(APPELLANTS)*

*(NORTHERN IRELAND)*

**ON 20 JUNE 2002**

**[2002] UKHL 25**

**LORD SLYNN OF HADLEY**

My Lords,

1. This appeal raises an important question as to the capacity and functions of the Northern Ireland Human Rights Commission set up by section 68 of the Northern Ireland Act 1998 ("the 1998 Act").
2. The question arises out of an inquest held by Her Majesty's Coroner for the district of Fermanagh and Tyrone into the deaths of victims of the bomb explosion in Omagh on 15 August 1998. Two matters became relevant. The first was whether the Coroner should order pre-inquest disclosure. The Coroner by letter dated 16 August 2000 asked whether the Commission wished to make a formal submission on human rights issues connected with that matter. The Commission prepared a skeleton argument on that and was represented by counsel at a hearing on 6 September 2000. Following representations on behalf of the next of kin, the Coroner exercised his discretion to order pre-trial discovery and so he did not call on the Commission.
3. The second matter concerned the scope of the inquest's remit. On 12 September the Commission wrote to the Coroner stating that in the opinion of the Commission "there may be human rights principles arising in respect of these matters on which it would be appropriate for the Commission to make submissions".
4. In the meantime the Coroner had told the Commission that the latter would be provided with transcripts since he was "satisfied" that the Commission's status equated "to that of a properly interested person". The Commission noticed that in the only skeleton argument prepared on behalf of some of the relatives there was no consideration of applicable human rights standards. Following correspondence and oral submissions as to whether the Commission had power to intervene, the Coroner on 27 September 2000 ruled that the Commission had no statutory power to intervene and that accordingly he could not permit it to intervene.
5. The Commission challenged the Coroner's decision pursuant to Order 53 Rule 3 (2)(a) of the Rules of the Supreme Court (Northern Ireland) 1980, asking for a declaration that the Coroner's decision (to the effect that the Commission had no power or standing to intervene in proceedings so that it could not be permitted to intervene at the inquest) was wrong in law. It was contended on behalf of the Commission that (a) the Commission could apply to intervene and (b) that the Court could permit the Commission to intervene for the purpose of making submissions and representations concerning human rights.
6. Sir Robert Carswell LCJ on 8 December 2000 considered that he was impelled to uphold the Coroner's ruling and he refused to make the declarations sought. The Court of Appeal by a majority (McCollum LJ and Sir John MacDermott, Kerr J dissenting) dismissed the Commission's appeal ([2001] NI 271).
7. The Lord Chief Justice had agreed to hear the matter even though the Coroner's inquest had gone ahead whilst the proceedings for judicial review were on foot and at a time when no substantive relief could be granted; the Court of Appeal agreed and in my view the Lord Chief Justice was plainly right to take this course.
8. The argument has focused on the provisions of the 1998 Act, the long title of which is "to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883".
9. Section 68 of the Act provided for the creation of the Commission. This was to take the place of the Standing Advisory Commission on Human Rights which was constituted under the Northern Ireland Constitution Act 1973 and whose functions were those of advising and informing the Secretary of State as to the adequacy and effectiveness of the law in preventing discrimination on the ground of religious belief or political opinion and certain related matters.
10. The powers of the Commission are on any view far more extensive than those of the Standing Advisory Commission. In the first place there is an overarching duty to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights" (section 69(1)). To that end the Commission is within two years to make recommendations to the Secretary of State as to improving the Commission's effectiveness and as to the adequacy and effectiveness of its functions (section 69(2)). It is required to advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights either when asked to advise or on its own initiative (section 69(3)). It is empowered to advise the Assembly whether a Bill is compatible with human rights (section 69(4)) to provide advice of the kind referred to in paragraph 4 of the Human Rights section of the Belfast Agreement (section 69(7)). It has an obligation to "promote understanding and awareness of the importance of human rights in Northern Ireland" (section 69(6)) and for that purpose it can provide assistance for research and educational activities. More specifically in relation to the courts the Commission is empowered by subsection (5)(a) of section 69 to give assistance to individuals in accordance with section 70 where proceedings involving the law and practice relating to human rights in Northern Ireland are involved, and where the Commission considers that a question of principle is involved or where there are special circumstances in which the Commission thinks it appropriate to provide assistance. Such assistance may take the form of legal advice, representation or any other assistance.
11. Even closer to the question now raised is the provision in subsection (5)(b) that the Commission may "bring proceedings involving law or practice relating to the protection of human rights" though that provision does not enable proceedings to be brought on the ground that legislation or an act is incompatible with a Convention right unless the Commission would be a "victim" for the purpose of proceedings brought in the European Court of Human Rights.
12. Since the Act is "for the purpose of implementing" the Belfast Agreement it is relevant to note the emphasis on the "protection and vindication of the human rights of all" in para. 2 of the Declaration of Support in the Agreement. There will, by para. 5 of Strand One of the Agreement, be safeguards to ensure that all sections of the community are protected, including (b) the European Convention on Human Rights and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission.
13. By paragraph 5 of the section in Strand Three dealing with "New Institutions in Northern Ireland" (page 17) it is provided that the Commission will be established with an extended and enhanced role beyond that of the Standing Advisory Commission including

**"keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so."**

14. The Lord Chief Justice accepted that a Coroner had power in principle to permit a person to intervene in an appropriate case and to ask for the assistance of an *amicus curiae* though the position of the intervener and the *amicus* had to be distinguished. He was not satisfied that under the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (rule 7) the Commission could properly be regarded as having a status which "equates to that of a properly interested person" with the power to examine witnesses. His view was that as a statutory body the Commission

**"has only the powers conferred by statute upon it, which will include such powers as may fairly [be] regarded as incidental to or consequential upon those things which the legislature has authorised: cf *Attorney-General v Great Eastern Railway Co.* (1880) 5 App Cas 473 at 478, per Lord**

Selborne L.C.; *Wade & Forsyth, Administrative Law* 7th Ed. p.219. In order fairly to be regarded as incidental, those powers, if not expressly conferred, must be derived by reasonable implication from the provisions of the legislation: *Baroness Wenlock v River Dee Co.* (1885) 10 App. Cas 354 at 362-3, per Lord Watson; and cf. Lord Macnaghten's remarks in *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 at 97."

15. Even with as broad and sympathetic construction as they would reasonably bear, the Lord Chief Justice was unable to find "anything in the section which confers powers on the Commission to make submissions to courts and tribunals about the content of the law relating to human rights or its application to a particular case." (p.10). He considered that none of the specific provisions of section 69 could be read so as to include such an implied power. In particular subsection (6) concerned with the promotion of understanding and awareness of the importance of human rights was "a proselytising function" and not an advocacy function like the role of an intervener or the non-partisan advisory function of the amicus. He had been asked to have regard to statements in Parliament, but though having doubts as to whether it was permissible to look at these following *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 he did not consider that they threw any light on the question whether the Commission had a statutory power to make submissions to the Court if permitted to do so.

16. In the Court of Appeal McCollum L.J. whilst accepting that it was right not to interpret the 1998 Act narrowly or restrictively ruled that "the provisions of the Act investing powers in the Commission must be looked at in the light of the stated objectives of the Act and in sympathy with its general import, but that does not enable a court to read something into the provisions which has not been enacted or to add to them at will". To allow the Commission to intervene in proceedings in which it had no direct interest as a party had one of two objectives. "Either it is not calculated to affect the outcome, in which case it is irrelevant, or it is calculated to affect the outcome, in which case a number of potentially undesirable results may ensue".

17. Thus, the public perception might be that the court was influenced by a government agency not a party to the proceedings. Costs would be increased. The party against whose stance the Commission argued would feel aggrieved by the inequality of arms. Moreover it was undesirable that the Commission should be involved in controversy in the course of a case to which it was not a party. "The concept of human rights itself and the interpretation of the Human Rights Convention or the Human Rights Act 1998 are not matters which should give a great deal of difficulty to a court." (2001 NI 272 at p.282).

18. He considered that the Commission would not be likely to have the necessary disinterested quality that one seeks in an amicus curiae. The principal ground for his decision was, however, that none of the specific provisions could be read as impliedly giving a right to intervene or to appear as an amicus. If Parliament had intended such a power it would have said so expressly. Other statutes where intervention had been permitted were distinguishable in that they contained a wider general power than the specific powers given under section 69 of the 1998 Act—eg. *R v DPP ex parte Duckenfield* [1999] 2 All ER 873 (section 6(1) of the Police Act 1996 and section 111(1) of the Local Government Act 1972); and *Re F (Mental Patient: Sterilisation)* [1999] 2 AC 1 and *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458 under section 120 of the Mental Health Act 1983.

19. Sir John MacDermott agreed with the reasoning of McCollum L.J. He found it significant that the Commission had not been given the powers of the Equal Opportunities Commission which the House had held gave it the right to intervene (*Equal Opportunities Commission v Secretary of State for Employment* [1995] 1 AC 1). The Belfast Agreement did not indicate that such a power was intended and it was significant that section 69(5) and para. 5 of the Agreement referred only to "bringing . . . proceedings". Although interested bodies increasingly had been allowed to make submissions "it seems to me however that though a court should feel free to seek assistance in whatever manner and from whoever has the appropriate expertise that fact cannot of itself create in statutory bodies the right to respond". He thought in any event that the fact that the Attorney General could also be asked to appoint an amicus (semble other than the Commission) would avoid any difficulties which the court might face. It was for him significant that the Republic of Ireland had expressly granted the power to appear as an amicus whereas nothing had been said in the 1998 Act.

20. I recognise the force of the reasoning of these three judgments and of the objections to the Commission's having the power to intervene which are raised by my noble and learned friend Lord Hobhouse of Woodborough. It has to be accepted that neither in the Belfast Agreement nor in the 1998 Act is there an express provision that the Commission may intervene in proceedings or appear as an amicus curiae even when human rights issues are under discussion. It is also clear that a statutory body usually has only the powers conferred on it by statute and I am prepared in this appeal to assume that such a rule applies even to a body with special powers and duties like the Commission. Such powers can however equally clearly include such powers as may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised. *Attorney General v Great Eastern Railway Co.* (supra). I accept that there will be statutes in which the express powers in a particular context are drawn so tightly that it would be wrong to read in other powers which could easily have been expressly included and where the proper inference is that they were deliberately left out. I also agree with Sir John MacDermott that one should not begin with the assumption that because "the Commission should have such a power it must have it and the statutory provisions must be read accordingly" (p.299).

21. The Lord Chief Justice (followed by the majority in the Court of Appeal) examined literally and in detail the provisions of the subsections of section 69. He found that the duty under subsection (1) to "keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights" could not of itself give a power to address submissions to a court. I agree that it does not expressly say so. It does, however, indicate the importance of the Commission in developing such law and practice. The organ most concerned with the interpretation and enforcement of human rights law and practice once incorporated by statute is the court. 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.

22. Sub-sections (2), (3) and (4) lay down the duty to give the Secretary of State and the Assembly advice and I agree with the Lord Chief Justice that in themselves they do nothing directly to support the Commission's case.

23. It has to be accepted that Sub-section (5)(a) in itself is limited to giving financial and other assistance to individuals in accordance with section 70. Moreover Sub-section (5)(b) refers to "bring[ing] proceedings" which as the Lord Chief Justice said is not apposite to an inquisitorial inquest before a Coroner. Both Sub-sections however indicate a role for the Commission in connection with court proceedings even though in respect of proceedings in which it is sought to contend that legislation is incompatible with the European Human Rights Convention they can only be brought, it seems, if the Commission can show that it is a victim for the purposes of the Convention. These provisions, even though do not expressly confer the power to intervene do not, it seems to me, rule out the possibility of the Commission having a role in court proceedings as intervener or as amicus if such role is incidental to express powers which are given.

24. The Commission has relied most strongly on sub-section (6) (to "promote [understanding] and [awareness of the importance] of human rights in Northern Ireland"). I have put these two parts of the provision in square brackets because it seems to me they must be read disjunctively. Again read literally they do not express a right to intervene or to appear as amicus. I do not, however, agree that this is, as the Lord Chief Justice accepted, merely a "proselytising function" which is inapplicable in courts which are assumed to know that human rights are important. Whether as amicus curiae, keeping within the limits of a non-partisan view of the particular case, or advocating as intervener 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, the Commission would have the possibility of promoting understanding by the courts of human rights law. Courts can gain much from such interventions as the House did in *R v Kansal (No 2)* [2001] 3 WLR 1562 even if the arguments in the end were not accepted. Thus whilst recognising that this gives no express right it seems to me to be a strong pointer to a function incidental to the Commission's primary duty or power.

25. Accordingly I agree with Kerr J. that the combination of subsections 69(1), (5), (6) and (8) indicate the conferring on the Commission of general powers to promote the understanding of human rights law and practice and to review its adequacy and effectiveness. The capacity to make (not a power to insist on making) submissions to the court are incidental to this general power. The fact that the question is

concerned with capacity rather than power in my view is important. The final decision lies with the court which can allow or refuse the Commission's application to intervene, invite or not ask for help from the Commission as *amicus curiae*. The provision that the Commission shall promote understanding of human rights law has thus to be read in this context subject to the court's control of its procedure. If the court wants or is willing to have such submissions the Commission has the capacity to make them as part of the function of promoting the understanding of human rights law, particularly if reference has to be made to some of the many decisions of the European Court of Human Rights. I am not troubled by the floodgates argument. The Commission must exercise caution in deciding whether a case is important enough to justify intervention or assistance; and whether there is a risk of particular parties or one party feeling that it is unfair that the Commission should come down on one side rather than the other in the legal argument. It is in the end for the court to decide these matters. The courts will only allow or invite assistance when they feel it necessary or helpful; with increasing knowledge particularly of cases in the European Court of Human Rights they may find it less necessary but this capacity to give assistance to the court is potentially valuable in achieving the purpose of the legislation. In my view the existence of that capacity is reasonably incidental to its main express powers.

26. I have not found it necessary to refer to the extracts from Hansard in order to resolve the question on this appeal. I do not however see that the Government's position in what is said there is inconsistent with my conclusions. Mr McNamara MP's amendment to the Clause which was later section 69 of the Act, would have avoided, at any rate in part, the issue in this appeal since it would have said expressly that with the leave of the court the Commission could submit an opinion as *amicus curiae*. One reason he gave was that that "would enable it more effectively to carry out the advisory and educational functions envisaged in the Agreement" (Hansard 27 July 1998 Col. 78). The Minister Mr Paul Murphy MP both on that occasion and on 18 November expressed the Government's view. On 18 November 1998 he said

"Courts will be free to ask 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 18 November 1998, Col. 1061).

In the House of Lords the Lord Chancellor said

"The European Court of Human Rights rules of procedure allow non-parties such as national and international non-governmental organisations to make written submissions in the form of a brief. There is no reason why any change to primary legislation in this [Act] is needed to allow the domestic courts to develop a similar practice in human rights cases.

...[Section 7(1)(b)] does not touch a third party who has not *ex hypothesi* been the victim of the infringement of a Convention right. It in no way precludes a third party from making submissions about the implication of Convention rights in written briefs if a written brief is invited or accepted by the court, as I believe will happen." (Hansard 24 Nov. 1997 Cols. 832-4).

27. It is contended that these passages are only dealing with the power of the court to permit or invite an intervention or an *amicus* brief. They do not explore the question of whether the Commission has the capacity to appear which is a prior question to that whether the court should give leave. This seems to me to be right; both Ministers assume capacity. That was however in my view a correct assumption. I do not read the reference to briefs from "non-governmental organisations" in the Lord Chancellor's speech as intending to exclude bodies like the Commission which are set up by Parliament; non-Governmental organisations were an example of the non-parties who might be allowed or asked to assist the court. In any case the position of the Commission is "not [to] be regarded as the servant or agent of the Crown or as enjoying any status immunity or privilege of the Crown" (Schedule 7 to the 1998 Act). On any view I do not see how the passages from Hansard can be said to assist the respondent's argument in this case to the extent that it seeks to rely on them.

28. I would accordingly allow the appeal and declare (a) that the Commission has the capacity to make submissions on human rights law and practice applicable in Northern Ireland if so permitted or invited by courts or tribunals concerned with issues of such law and practice; (b) that in particular the Commission may with such permission or by invitation appear to make submissions on relevant issues of human rights law and practice at inquests conducted by Her Majesty's Coroners in Northern Ireland.

#### LORD WOOLF

My Lords,

29. For the reasons set out in the speeches of Lord Slynn of Hadley, Lord Nolan and Lord Hutton, I agree that this appeal has to be allowed and that the order which is proposed by Lord Slynn should be made. I am, however, acutely conscious that together with the majority of your Lordships I am disagreeing with the views of Lord Hobhouse of Woodborough, the Lord Chief Justice of Northern Ireland and the majority of the Court of Appeal in Northern Ireland. Furthermore we are doing so as to the interpretation of the Northern Ireland Act 1998, which was enacted in particularly sensitive political circumstances, in relation to the powers of the Northern Ireland Human Rights Commission. I therefore propose to set out shortly my reasons for coming to the same conclusion as the majority of your Lordships.

30. If the Commission has the power to intervene in legal proceedings, then it is common ground that this is not a power expressly conferred by the 1998 Act. The issue is whether the Commission has an implicit power to intervene. I suppose it is right to regard this as an issue of interpretation. However, it is not an issue which involves deciding what is the true effect of statutory provisions which are obscure as to their meaning. The language of the sections (primarily section 69) of the 1998 Act with which we are concerned is perfectly clear. The task involves deciding whether in view of the express powers clearly conferred on the Commission it is right to conclude that the Commission has an implicit power to intervene in legal proceedings if the court conducting the proceedings agrees that it should do so. As Lord Slynn and Lord Hutton both point out, the answer to the issue depends on whether the power can be fairly regarded as incidental to or consequential upon the powers which the legislature has expressly conferred.

31. Deciding whether the power to intervene in legal proceedings is to be regarded as incidental or consequential involves, not only considering individually each of the possibly relevant express powers, it also involves considering those powers as a whole. In addition it is necessary to identify the purposes for which this body was established by the legislature. The task was correctly approached by Kerr J in his dissenting judgment in the Court of Appeal. Having asked himself the right question he came to the conclusion that the general nature of the Commission's role included the promotion of human rights and that the power to intervene when permitted to do so in legal proceedings was an implicit part of that role.

32. The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively a rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's

judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.

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