HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Judicial review and enforcing human rights, HC 871

Monday 12 October 2020

Watch the meeting

2.30 pm

Members present: Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Fiona Bruce; Ms Karen Buck; Joanna Cherry; Lord Dubs; Baroness Ludford; Baroness Massey of Darwen; Dean Russell; and Lord Singh of Wimbledon.

Questions 1-14

Witnesses

I: Alison Pickup, Legal Director, Public Law Project; Professor Alison Young, Sir David Williams Professor of Public Law, University of Cambridge; Polly Glynn, Partner, Deighton Pierce Glynn; and Rt Hon Lord Dyson.

Examination of witnesses

Alison Pickup, Professor Alison Young, Polly Glynn and Rt Hon Lord Dyson.

Q1 **Chair:** Good afternoon and welcome to this session of the Joint Committee on Human Rights. We are a Committee of Parliament. Half our Members are Members of the House of Commons, MPs, and half are Peers, Members of the House of Lords. As our name suggests, we are particularly concerned about human rights: the basic right not to be detained without proper excuse and justification, freedom of speech, freedom from torture, the right to life, the right not to be discriminated, freedom of assembly—very fundamental basic human rights.

We are also very concerned about how individuals can enforce their human rights and how we make sure that the rule of law is respected, including by government.

It is fair to say that no Governments are particular fans of judicial review, whereby individuals go to court and ask for a ruling on government action. Successive Governments find it very annoying to be judged by the courts when they feel they have the right, coming from their authority in Parliament, to take the action they have taken. I think it is true to say there has always been controversy about the role of judicial review.

This Government announced in July 2020 that they had set up an independent review of administrative law. It is currently taking evidence and will report before Christmas. It will look at the role of judicial review, the role played by the courts, whether it is necessary to put reform into statute, and whether the Government's review will find solutions or make matters worse.

We are very grateful indeed for a very eminent panel of witnesses this afternoon to help us to decide what we say in our report as a contribution to the Government's independent review on administrative law. I thank all our witnesses for coming to give evidence today. They are Alison Pickup, who is legal director at the Public Law Project, which does judicial reviews as well as statistical analysis. We have Professor Alison Young, who is professor of public law at Cambridge and is affiliated to the Oxford Human Rights Hub. We have Polly Glynn, who for many years has taken public law and human rights cases, including judicial reviews, in the High Court, the Court of Appeal, the Supreme Court and the European Court of Human Rights, and is currently a partner in the firm Deighton Pierce Glynn.

We are also joined by Lord Dyson, who was Master of the Rolls and Justice of the Supreme Court. We are very grateful to all of you giving evidence from the basis of a great deal of experience in your

own particular ways, particularly Lord Dyson. We are very much assisted in this Committee when former members of the judiciary can come and talk to us about the practicalities of the situation, so thank you very much indeed.

I will start by asking each of you to say what you believe the value of judicial review to be as a way of enforcing human rights. Is it effective in that way?

Alison Pickup: On the value of judicial review, I would say that it works at three levels in enforcing human rights. First, it works at the individual level by enabling individuals to have an effective remedy for a violation of their rights. Perhaps most importantly, judicial review has a role to play where there is an ongoing breach of rights; for example, it allows people who are unlawfully administratively detained to be released, separated families to be reunited, or legal aid to be granted to victims of domestic violence facing their abusers in court.

Secondly, judicial review plays a role of the level of laws and systems. It creates a check and balance to ensure that laws, policies and regulations are compatible with human rights and the promotion of rights, the primary duty there of course being Parliament's and the Government's, but the courts, through judicial review, can play an important role. An example is when the Department for Work and Pensions introduced changes to personal independence payments, which discriminated against people with mental health problems. Judicial review was able to intervene and hold that that discrimination existed.

At a structural level, respect for human rights requires respect for the rule of law. Judicial review is obviously important, not only for protecting human rights but in the broader constitutional framework. It is a key mechanism, a key check and balance, for ensuring that government is accountable to Parliament for the laws that Parliament passes.

The second part of your question was about whether judicial review is effective. My answer is mixed. It is effective in many cases, and I am sure we could all give lots of examples of cases where judicial review has served to protect human rights, but in order to be truly effective it also needs to be accessible to ordinary people. There are a number of features of the current system that make it harder for people to access. There is a lack of awareness and understanding of judicial review, when it can be used and the role it can play. There are difficulties in accessing legal advice, particularly for those who need legal aid; there have been

restrictions on legal aid, and there are areas of the country where it is hard to get access to specialist public law advice.

Finally, there is the barrier that arises from the costs involved, and not just the costs of paying your own lawyers; if you lose a case, you run the risk of being ordered to pay the opponent's lawyers, which can run to tens of thousands of pounds. That operates as a real barrier to access to judicial review for many people. So although it works when people get access to it and it can provide a very effective mechanism for enforcing human rights, there are barriers to accessing it that make it less effective.

Chair: It is useful to hear about how it could be better, not just how important it is as it is, so that is very helpful.

Professor Alison Young: I have very little to add to Alison Pickup's excellent account, which echoes how academics view this. I would add that judicial review is designed, particularly in the protection of human rights, to play to areas where the courts are able to provide better protection than you might find through legislation. We often find areas of legislation where the legislature has thought carefully, often aided by this Committee, about how to ensure legislation does not harm human rights. Nevertheless, there can be individual circumstances in which you are unaware that it will have a harmful implication in that particular situation.

There can also be situations in which there might be human rights beyond the Human Rights Act, such as fundamental common law rights that can be protected through judicial review, which again the courts have a much better understanding of and a much better ability to protect through aspects of judicial review. The courts are also able to recognise that legislation enacted a long time ago was in line with human rights, but that human rights visions have changed since then, and the courts can bring that to the attention of the legislature and the Government. I would stress those kinds of constitutional aspects, and that the court is playing a very important role alongside the legislature through judicial review to make sure that human rights are protected.

Polly Glynn: I am not an academic, so I come to it from another way. The kind of law that I am doing day to day is acting against hard-pressed government departments that have a whole load of things, austerity being a big part of it, which means that they are trying to do things as cost-effectively and cheaply as possible.

I see judicial review as making sure that what Parliament says is the law is carried out on a day-to-day basis for the people it affects. It is not that anybody in government is bad or evil or trying

to do the wrong thing; they just have so many other pressures. Judicial review just means that there is a way of saying, "But you also have to obey the law". It is so important, especially for people in Parliament, to remember that if you do not have the law and judicial review to make sure that what you say the law is actually gets done, there is almost no point in having a law. I see it from a very practical point of view.

The really nice thing about judicial review is that it is not about damages and getting something when something goes wrong; it is about getting it right when it matters, which is absolutely at the time. It is not about the past; it is about decisions that affect people on a day-to-day basis. You can be instructed by somebody and go to court that day, get an order and get the wrong decision reversed. It is a quick, easy and straightforward thing to do.

I act for the claimant against the Government, but what we all hope in the sector is that government decisions and decision-making get better. There is a government document called JOYS, *The Judge Over Your Shoulder*, which is a guide for decision-makers in government. It encourages people in government to make the right decisions because of the way the law works and because they could be challenged by the law. Ideally, that is what judicial review does; it makes decision-makers do things properly, lawfully and fairly.

It is very easy to think when you make a decision—I think we have all done this—that you are sure you have made the right one because you know best. I always think I know best, but if you are made to jump through hoops and to think about all the other things, you get to a better decision. That is what judicial review helps government to do. It is really important in those three ways.

Chair: Thanks very much indeed. All three of you have said what an important role judicial review plays and explained it very lucidly. The sense is that somehow judicial review will be undermined. This review is an independent review, though, and we can suggest ways of making judicial review better and more accessible, and think of the positive side, so please bear that in mind in your answers. I know it feels as though we might move backwards, but there is always an opportunity to argue that we should move forward.

Lord Dyson: I do not have a great deal to add. The three expositions have been absolutely excellent; they all complement each other. There is no contradiction that I can see between anything they have said. Of course, I come at it from a different vantage point, because at the Bar I did not do judicial review but as a judge I did a lot of it. My perspective is more from the Bench,

which is perhaps valuable because I have not acted for the Government or for claimants.

It was interesting to hear what you said at the outset, Chair, about Governments disliking judicial review. Of course, they all say how important judicial review is and what an essential component of our constitution it is. I entirely agree. That is what they say, but we all know that when the Government are stopped in their tracks and prevented from doing something that they want to do, they get pretty angry. They usually do not say that; they usually say that they are disappointed. That seems to be the word they use, but translated that means that they are cross.

I fully take on board the point you just made, Chair, about possibly using this as a springboard for improving judicial review, which I take to mean expanding its scope and making it more accessible for the would-be claimant, but that is not the sense I get from looking at the terms reference. It is likely stimulated by the very small number of high-profile reverses, like the two Miller cases and one or two others. The sense I get is that they are looking for ways to rein it in. They are not looking at ways of expanding it or making it easier for litigants to come to court.

The whole tenor with this Government and their predecessor, the coalition Government—I had a lot of dealings with Chris Grayling when he was Lord Chancellor, and he was the author of the procedural reforms that were introduced in about 2014—is about trying to reduce judicial review. That has happened. The statistics are quite striking; you can see it in the number of permission applications, which has dropped very substantially in the last few years. I am a strong supporter of human rights, and judicial review is very important, but one should be under no illusion about the current climate. Certainly as I read the signs from this Government, that is what is inspiring this inquiry—a desire to rein things in even more.

Chair: Thank you. I am sure you are right, that that is very much the case, but it is still worth us thinking about how we could even improve accessibility and any such issues. As Polly said, it is about making the Government the best Government they can be by knowing that they have to be accountable and get it right.

Q2 **Lord Brabazon of Tara:** I am a Member of the House of Lords. My question is mostly directed to Alison Pickup and Polly Glynn. Do cases always have to reach the court in order to protect an individual's rights, and can you give any examples of that?

Alison Pickup: The short answer is no, they do not always have to reach court, and very often they do not. Experience and evidence

show that a lot of judicial review cases are resolved before they get anywhere near a court. It is obviously very hard to quantify how many cases get resolved even before the court process starts, because nobody keeps the statistics, but there is some evidence that roughly six in 10 cases are resolved. I am sure Polly will have more to say about the letter before claim process.

Many cases are resolved through the pre-action procedure, which requires us to write a letter to the proposed defendant, setting out the grounds and giving them a reasonable opportunity to respond. It does depend a bit on the subject matter. It is perhaps more common in individual cases, but I also have experience of cases where a policy or a set of regulations has been withdrawn or changed by a Government following a pre-action letter. That does not necessarily always get headlines, and you do not read about it because there are no reported judgments, but that is the sort of everyday reality of judicial review.

Once cases have started in court, many of them will be resolved before they get to a judicial hearing. The statistics show that about 27% of the cases that are started in court are withdrawn before they reach the permission stage, and a lot of those will be because they have been resolved, often favourably to the claimant. Then, about 30% more end between being granted permission to proceed and the actual final hearing.

The cases that go to a final hearing and have a judgment that may be reported are just the thin end of what judicial review is about. It is certainly my experience that cases will very often be resolved in a way that is favourable to the claimant, to the individual, through that process.

Chair: Lord Brabazon asked if there were any examples, and you mentioned regulations being changed by their having been challenged in the judicial review process but not getting to court. Do you have any examples to hand?

Alison Pickup: Yes, I have two specific examples. In terms of policy, there was a Home Office policy relating to notice of removal. With regard to the first version, a letter before claim was sent by a charity and the Home Office withdrew that policy and agreed to revise it. It came back with a subsequent policy, which has been subject to further challenge. None the less, it revised the first version in response to a letter before claim.

In terms of regulations, there was a set of regulations, cross-border taxation regulations, that were part of the Brexit legislative process and purported to delegate a power to Treasury officials to

change cross-border taxation rules by public notice on its website. The Public Law Project sent a pre-action letter to the Treasury pointing out that these regulations were not authorised by the delegated power that had been given by Parliament, and the regulations were withdrawn on receipt of that letter.

Those are examples of individual cases. Sometimes it does not even require a letter. We had a case involving a man on universal credit who had been sanctioned just before Christmas. He had no money for food or heating. He had tried to resolve this with the help of local advisers. When one of our solicitors was instructed and phoned up the department, it immediately reconsidered the decision and paid him his arrears, and he was able to get money before Christmas. Sometimes even just having a solicitor involved can make a difference at that early stage.

Polly Glynn: There are two kinds of judicial review. One is the big cases like Miller or changing policies. Others include a government body acting completely unlawfully to save money because it is quicker, because it cannot be bothered to get the law right, or for whatever reason.

I think I was asked here partly because I am running a project to help front-line organisations that act for destitute people to challenge local and central government decision-making where the decisions are very clearly wrong. I help the front-line organisations to write formal pre-action letters giving notice of a potential challenge. In 80% to 85% of cases—we have done hundreds of them—when we write a formal pre-action letter, the government body will concede and agree to accommodate or support the destitute person or family. In that way, the rate of success of the pre-action is extremely high—with these cases, 85% will never go to court—which just shows how the threat of judicial review can work to make sure that the government department acts lawfully.

About 10% of the cases that are not settled at that stage then go to court. Those cases are conceded almost invariably before permission, after the court makes an interim order that the person is provided with support or accommodation. There are so many judicial review cases like this where the law says, "This person should be accommodated or supported", or, "This should happen", and then it just does not happen. In those cases, the pre-action procedure and settling it an early stage happens incredibly quickly.

Because of the problems of getting funding and getting lawyers if you are poor, those kinds of decisions will affect you much more than if you are rich and you have access to the law and lawyers.

Those kinds of decisions on the whole affect people who are disadvantaged by society.

Chair: Thanks very much. Often judicial review is seen as somehow against Parliament, because Parliament has decided, the Government are doing what Parliament wants them to do, and the courts are striking it down. But you said that judicial review can sometimes ensure that Parliament's will in the legislation, if it is not being complied with by the Government, can be upheld, so that is quite a—

Polly Glynn: To me, that is absolutely the key. I almost think that if you do not have judicial review making sure that the laws and the regulations that you pass as Parliament are complied with by the Government, there is no point Parliament sitting there discussing the minutia of these things because it just will not happen. It happens only through judicial review. We are talking about people who do not have the social capital to go to the newspapers or the news and have their stories heard in that way, and without that it is purely by judicial review that what Parliament says is taken any notice of.

Chair: That is very clear. Thank you very much.

Q3 **Baroness Massey of Darwen:** I am a Labour Peer in the House of Lords. My question is directed to Alison Young and Lord Dyson, but given what Alison Pickup said earlier about checks and balances, she may wish to join in.

Does judicial review on human rights grounds ever result in the judiciary making political decisions that are best dealt with by the Executive/Parliament, not by the courts?

Professor Alison Young: I will address that first and then hand over to Lord Dyson. Before answering that, we need to build on the context that we have already mentioned. Often we think about courts potentially taking political decisions because we are thinking about the big, key constitutional cases that come to the courts and we are not looking at the vast bulk of judicial review cases, where what the court is normally doing is ensuring that Parliament's will, as set out in legislation, is enacted on a day-to-day basis.

Having said that, I can understand why some could think that there are circumstances in which courts make political decisions. It is very hard for me to prove a negative and say that it has never been the case, but I would draw your attention to the way the courts are very careful when implementing decisions in human rights cases to make sure that they do not take political decisions.

The easy point to make is that just because you are taking a decision in the law that has political consequences, that does not mean that you are taking a political decision. That is very clear. I think that everybody in Parliament and most people watching the decisions being made are aware of that.

I would draw your attention to various ways in which the courts try to make sure that they do not take political decisions. Particularly when we look at human rights cases, we see courts applying a test of proportionality to make sure, when we are balancing rights decisions, that the reasons for restricting a right do not outweigh the reasons for protecting that right, so we are balancing protecting the right against restricting it.

It is important to recognise in those cases that the courts perform that test in a way that is sensitive to political choices. In social cases like the bedroom tax case, for example, which hit the headlines a few years ago, the courts modified the test and said, "It has to be manifestly without reasonable foundation for us to say that you're breaching rights in these certain circumstances".

In other cases, they will take account by looking more at evidence that is provided to them and looking at the suitability and the necessity stages of proportionality before getting to balancing and to performing what some might see as political choices. When they perform these balancing tests, they apply deference—a wonderful legal term—or give weight to the Executive.

It is about recognising that there are certain areas of decision-making powers where either the Executive or the legislature have more experience. The courts will take account of that when they are scrutinising to make sure that they take note of areas of discretionary powers, particularly in social welfare cases or in cases involving a local authority decision, which might involve balancing a lot of different interests, because protecting a right in one area might have knock-on consequences in other areas.

The court is very sensitive to these issues. Even in the big cases that have large consequences, the courts are very careful to make it clear that they are taking legal decisions. They are not perfect.; I do not think that any court would say it is fully perfect. As we have all been saying, none of us is perfect; we all make mistakes, and judicial review is there to perform good checks and balances, and the legislature is there to keep an eye, in a sense, on what the courts do, as do the public. I do not think I could ever, hand on heart, say that they have never taken a decision that some might see as potentially political, but I do think that the courts are extremely careful to make sure that they do not cross that line.

Lord Dyson: We all seem to be agreeing with each other so far, and I agree with all of that. It is impossible to say that something never happens, because judges are human beings and they make mistakes. Some of these decisions are very sensitive and call for balancing exercises, and some of those balancing exercises are extremely difficult. There is no black line that is easily identifiable.

That is why in some of these difficult cases the courts disagree with each other. That is why appeals get allowed, and why there are dissenting decisions, because these cases are very difficult. Inevitably, because of the difficult nature there is room for disagreement, and not only among judges and lawyers. Politicians also take a view on their decisions. Some will applaud the decisions and some will deprecate them. The trouble with the question and why it is difficult to answer in a way is because the situation is not black and white.

If one wanted to be pernickety, one could ask, "What is meant by a political decision?" It is not that straightforward. There are decisions that have political implications, as Professor Young has just said, but judges are not taking political decisions. I am afraid I think that when politicians feel that judges are taking political decisions, those politicians are not very clear in their use of language. What they really mean is that judges are taking decisions that have political implications, and it is right to say that in some cases judges are taking decisions with political implications. That is because they are called upon to decide whether or not to do that. They are faced with a case in which there is a challenge and they have to either accept or object to the challenge.

I can tell you from my own experience, from speaking to other judges, and more importantly perhaps from a careful examination of the decisions in some of these difficult cases that [*Inaudible.*] but I entirely agree that the eye-catching cases that people get very excited about, although I do not want to underestimate their importance, are few and far between. The overwhelming run of judicial review cases, both in the human rights field and elsewhere, are run of the mill cases involving particular challenges by individuals who are affected by a decision.

These eye-catching cases are very easy to get very excited about and judges are only too aware of the fact. The case of Nicklinson, the assisted suicide case, is a very good example. I happened to be involved in that case and I was only too aware of the fact. This was the case in which there was a challenge to the statute that says that assisting somebody to commit suicide is a crime and is

certainly incompatible with the European Convention on Human Rights and is therefore unlawful.

You can imagine that in a case like that any judge will be very sensitive, very careful. In fact, I decided in my judgment that this was not a matter for the judges. There were too many considerations of a moral, social, and if you like political nature that were not appropriate for a judge to decide. In the Supreme Court, there was a difference of view about that. Some of the judges thought that it was for the courts and others that it was not. That is a particularly good example of a very difficult case at the boundary, if you like.

To echo what Professor Young has said, judges are very alive to the difficulties here. They know that they are not elected and that there are certain no-go areas. The problem is the dividing line between what is and is not a no-go area.

Q4 **Dean Russell:** This question might be best answered by Professor Young and Lord Dyson. Does the law on which disputes are not suitable for judicial resolution need more clarification?

Lord Dyson: In a way, this is a follow-on from what we have just been talking about, but the focus here, as I understand it, is on whether there is a need for clarification. It follows from what I have been saying about the borderline between what is suitable for judges to decide and what is not being sometimes difficult to define. There are formal criteria that the judges apply, but ultimately it is a matter of feel almost as to what sort of cases are appropriate for a judge to decide.

One extreme is cases involving foreign policy or national security and things of that kind, which obviously are not ones for a judge to decide. They do not cause a problem. The vast bulk of judicial review cases, human rights cases and others, also cause no problem. It is the borderline cases that are the problem. Numerically there are very few of those cases, but there are a few.

I do not think that anything can be done to clarify the matter. I assume the question is asking whether a purpose will be served by clarification in the form of statute.

Dean Russell: Yes.

Lord Dyson: My own view is that no good purpose would be served. The judges have been wrestling with this problem for years and there are a lot of cases on the subject, but they are very case-specific. If you enacted a statute, what would it say? It would have to be at a very high level of abstraction and generality, and it

would have to give examples, but life is so complex that the range of examples is almost infinite. Ultimately, if you had a statute that identified certain categories of case that a judge should not decide, the judges would still have to interpret that statute. All that would happen is that you would build up a new body of case law, which I suspect would not in fact be doing anything very different from what has been happening for the last few decades, if not longer.

I feel quite strongly that little purpose—in fact, I see no purpose—will be served by seeking to clarify the areas of justiciability to give it a legal label, and would not achieve anything not already in play as we currently have it.

Dean Russell: Thank you. Professor Young, Lord Dyson just gave a very full answer on this, but in your view does the law on which disputes are not suitable for judicial review need clarification?

Professor Alison Young: I do not think it does, for a number of reasons. First, in the case law at the moment, there is a clear set of criteria for thinking about what is and is not justiciable. The courts, since the Supreme Court decision of 2014, have looked very carefully at whether there are constitutional reasons for why the court should not look at an issue and so would consider it non-justiciable, as well as looking at whether there are other reasons. For example, if it is purely meant to be domestic and not to set up legal relations, in those cases the courts are very careful not to intervene because they recognise the proper bounds of their power.

Difficulties arise in the way in which we can deal with justiciability issues. We recognise that there are sets of principles that we can point out, but how they apply in different circumstances is very context-specific. This might give the impression that it is not clear, even though there are a clear set of criteria setting out how they might be applied. Take, for example, the case law on the justiciability of prerogative powers, which obviously came very much within the framework of the news following the first Miller decision and the second Miller/Cherry decision, both of which looked at prerogative powers.

You can point to clear examples of when the courts will or will not be willing to intervene, so they do look at the subject matter of the power. They are not willing to intervene in matters of high policy, but they are willing to intervene in various areas that do not involve matters of high policy or complex policy decisions. You would not see the courts, for example, judicially reviewing a decision to go to war, because it would be seen as a matter of high policy. You will see them intervening if there are aspects of lower level policies, the element of the need to protect individual rights or

in circumstances where you point to clear aspects of legal challenges that will not require elements of balancing of policy decisions in certain circumstances.

There are two main problems in thinking that this could be put into a code to try to make this clearer. One is that justiciability is not just about judicial review; it is about justiciability across a large range of areas. If you put this into legislation, you would have to be aware of all the different areas in which justiciability might arise, and you could end up with quite a complex set of precise situations that might be difficult and might detract from clarity if you end up with a very complex piece of legislation.

Secondly, the best way of dealing with this is through principles that arrive in practical circumstances. If you were put those principles in a code, you would still end up with the courts having to go away and interpret how those principles apply in certain circumstances, so you would not necessarily get any greater clarity than what we have at the moment.

Dean Russell: Thank you for a full answer.

Chair: Thank you. That has given us a great deal of clarification. Can we turn to Lord Singh for the next question?

Q5 **Lord Singh of Wimbledon:** I am a Cross-Bench Member of the House of Lords. I will direct my question to Lord Dyson, but other witnesses are more than free to comment if they wish.

Do you agree with Lord Reed's recent comment that some of the reaction to previous judgments, which found against the Government, were due to a lack of understanding of the judiciary's role, how we operate and perhaps a degree of suspicion of what our motives might be? If so, what may be a way of remedying these issues?

Lord Dyson: I agree with what Lord Reed says. The problem is that you get adverse comment about judges' decisions from different people and for different reasons. We are not talking here about academic lawyers criticising a decision because they think they have the law wrong; we are talking about some parts of the media and some politicians who do not like some decisions.

I do think that part of this is through ignorance or something more akin to being wilful and almost trouble-making—I do not know—but I cast my mind back to the decision in Miller No. 1, where the High Court could not have made it clearer that it was saying nothing whatsoever about the merits of Brexit and that it was deciding questions of law. It could not have been clearer on that. That was the decision that famously had the *Daily Mail* portraying these

judges as enemies of the people, meaning that they were out to wreck the Brexit idea. That was bordering on the mischievous, frankly.

What can you do about it? It is very difficult to know. It is very difficult for the judges to do very much about it. What was said by the Lord Chief Justice in the judgment in that case could not have been clearer. There have been other examples where the courts have gone out of their way to say, "We are not saying anything about the merits of this. We are merely deciding whether it is in accordance with the law, and that is our role".

If people do not believe that, then I do not see what else judges can do. I am afraid I have rather come to the conclusion that we just have to soldier on, and when I say "we" I mean the judges. They have to be true to their own and decide cases in accordance with law as they see it. If the other party loses, they can appeal, but ultimately they will run out of appeal options. They have to say what they have decided and why they have decided it as clearly as they can. I do not think they can do more than that.

Lord Singh of Wimbledon: Thank you. It is normal that people will interpret judgments through their own prejudices. Could there be some amplification of the constraints in which the judgment was made to reduce people commenting with their own prejudices?

Lord Dyson: You mean that they should emphasise every time they are deciding a controversial case.

Lord Singh of Wimbledon: Yes.

Lord Dyson: They are not deciding anything about the merits, but they are operating within the four corners of the law. Yes, I think we try to do that. Maybe we do not do it quite well enough. In these very entitative cases, certainly in every case in the Supreme Court, as you probably are aware, it will accompany the judgments with an executive summary. When I was Master of the Rolls, I introduced the same thing in the Court of Appeal for particularly high-profile and sensitive cases. You can write it as clearly as possible.

Maybe the judges are not quite as good at doing that as they ought to be, but they are certainly now fully aware of the fact that if they do not make it absolutely clear what they can and cannot do, there is a danger that what they are saying will be mischaracterised. They certainly ought to be aware now of that risk, but I do not think they can do more than express their decision with clarity in their judgments, accompanied—as may be necessary—by an executive summary.

Lord Singh of Wimbledon: Thank you. That is very helpful indeed.

Q6 **Joanna Cherry:** Good afternoon. I am the Member of Parliament for Edinburgh South West. I should perhaps declare an interest and refer to my entry in the Register of Members' Interests, because I was the first petitioner in the Cherry case that Professor Young just mentioned, although I am not planning on making a habit of bringing judicial review actions. That is not a promise, just a general statement.

I am interested in this idea of trying to codify the amenability of public law decisions to judicial review, which is covered in the first term of reference for the independent review. I know we have touched on this already with Lord Dyson and Professor Young talking about defining justiciability and the possibility of codification.

Professor Young, if I may I will direct my question to you in the first instance. Given that this is a specific term of reference for the independent review, can you say whether there is any problem in principle with the amenability of public law decisions to judicial review being codified in legislation?

Professor Alison Young: Thank you. I will try to answer that. In a lot of ways, the simplistic answer is just to say, "Of course there is no problem, because we have parliamentary legislative supremacy, which means that if Parliament want to put it on a code, it can do so". But I think that is to misunderstand the way in which the UK constitution works and may be problematic at a deeper principled level in making sure that we properly uphold elements of the rule of law, making sure that there is proper access to judicial review and, as we have been discussing a lot in this Committee, making sure that the courts can ensure that administrative bodies enact things in line with the will of Parliament, as set out in legislation.

If you put it into a code, it is important to recognise that the courts will need to able to interpret that legislation. It is part of their proper constitutional role to do so, and it is important to ensure that the courts are in a position to do that and to make sure that they can continue to interpret legislation in a way that does take account of background constitutional principles like human rights and upholding the rule of law. It is also important to recognise that, because we have parliamentary sovereignty, we are not used to a system that has codes. We are used to a system that develops principles through the common law and where we see the courts

performing a good check by developing these principles through the common law.

If you move towards a code, you have to recognise that we do not have a system with constitutional protection of certain elements of rights and where we can, in a sense, codify the precise powers of the Executive and the precise limits of those powers in all particular and possible situations. There could be a deeper principal problem in codifying judicial review while making it difficult for the courts to interpret that correctly, and without also thinking carefully about codifying precisely all the different powers of the Executive, because it might mean that we do not have the right form of checks and balances of the rule of law and the protection of human rights against parliamentary sovereignty.

Q7 **Joanna Cherry:** There has been quite a bit of discussion about ouster clauses because of Part 5 of the internal market Bill, and obviously we had the decision in the Privacy International case. Can you explain for us how the jurisprudence on ouster clauses might be of relevance here?

Professor Alison Young: For those who are not familiar with ouster clauses, these are clauses that decide that certain issues cannot be reviewed by the court, so often they will be decisions from inferior tribunals or inferior courts, and then there is a decision that there cannot be a judicial review of their determinations later on. The court looks at those clauses very carefully to make sure it will not be in a position where it removes effective checks, particularly legal checks, to make sure that the decisions are made in a legally correct manner.

In the Privacy International case there was a clause saying that the decisions of the Investigatory Powers Tribunal could not be questioned in a court or tribunal, including for errors as to jurisdiction. The court made it very clear that if you made a legal mistake as to whether you had the power or not, the courts needed to intervene to protect the rule of law. The court also made it very clear in the Privacy International case, by a majority, that it was for the courts to determine the scope of how far we should have principles of judicial review to make sure that we can uphold the rule of law. That is a very important way for the courts to make sure that there are these proper legal checks on whoever has a particular power to make sure that we uphold the rule of law.

Joanna Cherry: Following up on this review, if Parliament legislated to attempt to codify in some way which public law decisions could be amenable to judicial review and which could not, the courts would nevertheless say, "No, if there has been error of

law, there has to be a review"?

Professor Alison Young: That is a possibility, yes. A lot of it will depend on the precise wording, but there is a presumption that there will not be a removal of this ability to have judicial review, particularly over decisions of administrative bodies, because of the need to uphold the rule of law.

Lord Dyson: I think Lord Carnwath in the Privacy International case said that it would be impossible to draft legislation that would oust the jurisdiction of the court. Professor Young will correct me if I am wrong about this, but I think that is what he said. I would be a bit surprised if the courts were to say, however explicit the language of a statutory provision was, that there could never be circumstances in which the jurisdiction—[*Inaudible.*]. It is a big and difficult question and certainly not one that we can engage with here this afternoon.

Joanna Cherry: What you are saying, Lord Dyson, is that we should be careful not to extrapolate too far from what was said in the Privacy International case, but there is perhaps an issue here that would have to be looked at carefully if anyone was trying to frame legislation.

Lord Dyson: That certainly would be my view.

Joanna Cherry: Thank you. Does anybody else want to come in on this point? It has a degree of topicality because of the discussions about ouster clauses in the internal market Bill.

Alison Pickup: I would echo what Professor Young and Lord Dyson have said about the approach that the courts will take and the importance of that approach in terms of the rule of law, because of the importance of there being some kind of check on the use of Executive power.

Q8 **Joanna Cherry:** Thank you. I will go to my next question. The terms of reference for the review also talk about potentially narrowing the grounds on which judicial review could be brought. Starting with Polly, how would narrowing the grounds on which judicial review could be brought affect the enforcement of human rights?

Polly Glynn: Going back to my original view of judicial review, it is supposed to mean that you can make sure that the law, as passed by Parliament, is obeyed by government. If you narrow the challenges so that some bits of law that are not obeyed cannot therefore be challenged, that is problematic and those bits of law are not worth the paper they are written on. If that is what is

decided, everyone should be very clear about it: this bit of law is something that everyone has to obey, but if you do not, nothing will happen.

That is no way for law to work. Maybe I am just a being lawyer about this, but I think that if something is in the law, people should obey the law and the Government should obey the law. That is what the law is about. I do not like the idea of laws that are just there and you cannot enforce them. If, when the Government say they are reducing the grounds on which you can challenge by judicial review, that means that you cannot challenge when the law is not being obeyed, I see that a wholly negative thing.

Joanna Cherry: When you are protecting human rights, what is the most common ground of challenge to use to a decision? Is it illegality or—

Polly Glynn: Yes, illegality, and sometimes Wednesbury unreasonableness. We just put it all in there. In a way, you think, "They could take away that and then we could just use that", but that is not really the point, is it? What they are trying to do is stop the kind of challenges that they do not agree with. I suppose that is my answer, really. If it was just sort of technical and we could get around it by using another ground, fine, whatever. But that is not what it is about. It is about stopping us challenging the Government when they do not obey the law. That, to me, is problematic.

Slightly going back to the question before last about the Government attacking the judges for saying what the law is, obviously solicitors and lawyers have been attacked in the press recently for using the law to represent their clients. That whole tenor I find incredibly worrying, because Parliament and every right-thinking person should want the law to be obeyed. If we believe in democracy, if we believe in the rule of law, the people who are trying to make the law work, be they lawyers or judges, are not enemies of the people at all. They are the people doing everything they can to support our democracy and our society, and that we should be heroes of the people, not enemies of the people.

Joanna Cherry: Thank you. Lord Dyson, how do you think narrowing the grounds on which judicial review could be brought might affect the enforcement of human rights in the courts?

Lord Dyson: The trouble is, I do not know what is envisaged by narrowing the grounds. You might want to go back to the austere Wednesbury unreasonable grounds for challenging a decision. That would be a massive step backwards. It would be unthinkable in the

human rights context unless we come out of the European Convention on Human Rights and the Strasbourg Court disappears from view. But you could come out of the convention, say goodbye to Strasbourg and go back to how the law was in 1948, and say that you can challenge substantively if you can show that a decision is Wednesbury unreasonable, which in those very stark early days it was almost impossible to do.

If you were to do that, you would undo an enormous amount of the protection of human rights that has built up over the last decades, and that will be a terrible thing to happen. I am not trying to be difficult, but it does depend in what way it might be proposed to narrow the grounds.

Alison Pickup: I have a couple of points to make. Two of them echo what Lord Dyson said but from a slightly different perspective. Lord Dyson spoke about the difficulty of answering this question when we do not know what is being proposed, which is a general problem in providing evidence to this review. We are being asked for our opinions on judicial review rather than on specific proposals for reform that are being consulted on. There is always an element of second-guessing what is happening here. There are many who share Polly's concerns about what is driving any question of narrowing the grounds.

Looking at the questionnaire that the panel has sent out to government departments, which asks for their views on the extent to which judicial review impedes the effectiveness of government by reference to the various different grounds of review, from a practitioner's point of view that is not how we deal with judicial review. It is not how it works. We do not think about those kinds of categories. We think about the legal problem with a decision and try to enumerate in separate ways. It is not that you throw it all in, it is about deciding the specific legal issue here.

If you narrow the grounds to unreasonableness or irrationality, if I had to challenge a decision that I would have challenged on the ground of illegality because it failed to comply with the law, I would say that it is irrational to act unlawfully. It is Wednesbury unreasonable to adopt a procedurally unfair process. The grounds are all very linked.

Rationality is a very high threshold and it is one that you turn to only in the most extreme of cases. It would be very regressive and very concerning to try to take the grounds back to that early stage.

Q9 **Baroness Ludford:** I am a Liberal Democratic Member of the House of Lords.

Turning from grounds to remedies, one of the terms of reference of the independent review concerns looking at the remedies available in respect of the various grounds on which a decision may be declared unlawful. It is probably reasonable to interpret that as looking at the possibility of narrowing. Does anyone have a view about reducing the available remedies depending on the grounds on which a decision is declared unlawful?

Lord Dyson: I see no justification for that at all. The difficulty with this whole exercise, which I am sure your Committee is sensitive to, is that we do not know where the Government are coming from. We have a general idea that they want to clip the wings of the judges and make it more difficult for people to bring judicial review claims of any kind, but there has been no specific reform that we can get our teeth into. It is a very strange and unusual system where a Government are considering possible changes. What they normally do is put forward a consultation paper and their ideas and the reasons for them. Then one has something to consider to say, "We agree or disagree", or whatever.

I cannot think of any justification for reducing the available remedies depending on the grounds on which the decision is declared unlawful. If the Government were going to argue with that, they would need to say what they want and why they want it.

Alison Pickup: I agree with everything Lord Dyson has said. I would add that there is a real value in the flexibility of the remedies that are currently available in that it allows the court to grant an appropriate remedy while leaving proper respect for the division of functions between the courts and the Executive. Most often it will be a quashing order, so the unlawful decision is quashed but it is for the Executive to decide what they will do about that and what happens next.

In human rights cases, sometimes the only remedy that is needed is a finding of the violation, but that has importance and value in itself. Those remedies are important, but without knowing what is proposed to be changed it is hard to say more than that.

Polly Glynn: In general terms, the only cases that are different from that is where the law is very clear. In the cases that I do where people are street homeless or destitute, we will get an interim order that that person be housed or supported within a certain amount of time. That is not controversial, because that is what the law says. The only thing the court is doing is saying what the law says.

Where it is a question of the decision not being quite right and the right things were not quite taken into account, they will be asked to take the decision again. It is only in the very straightforward cases that you will get something other than a quashing order.

Professor Alison Young: The only thing I would add is to put it in context and to recognise that there were already reforms under the Criminal Justice and Courts Act 2015, which have already provided a way of restricting remedies in certain circumstances. It is already harder to get a remedy than it used to be before those reforms, and this has already had an impact on judicial review.

Thinking about the possible reforming of remedies even further and making it more difficult to obtain them, I think you will have to act very cautiously and look very clearly at the evidence of the impact of those reforms, and stress the importance of effective remedies in this area, particularly when you are dealing with individuals in what we might think are run-of-the-mill cases but which are some of the most important cases where we are protecting vulnerable individuals in very specific circumstances that need a very clear and precise remedy.

Q10 **Baroness Ludford:** Previous Governments have already sought to "reform" judicial review. What effect has this had, and are further changes needed? Professor Young started on that theme. I do not know whether she wants to continue before other people come in.

Professor Alison Young: In this area, it is very important to refer in particular to Alison Pickup's work, because she has very important statistics. That is much better than my overview, which is from an academic perspective.

Baroness Ludford: That is excellent, because I was going to go to Alison.

Alison Pickup: It might be helpful to highlight what those reforms have included. The most recent programme of reform was between 2010 and 2015 under the coalition Government and involved a number of different strands, mainly procedural, including moving most immigration judicial reviews to the Upper Tribunal as part of the reform changes in fees, increasing most fees for applying for a judicial review, and introducing a new fee of £385 for an application where someone is refused permission on the papers and renews it to an oral hearing.

Changes to legal aid, which have meant that, when you bring a judicial review under legal aid funding, if permission to apply for judicial review is not granted, the lawyers are not entitled to be paid for the work that they did in preparing the application for

permission. Bearing in mind that statistics show that permission is granted in only 20% of cases, that has obviously had a significant impact.

The statutory changes in the 2015 Act included the new test for refusing relief on the basis that, although the defendant had acted unlawfully, it is highly likely that it would have made no substantial difference if they had acted lawfully, and also included changes to cost-capping orders, which are available in public interest cases, new rules on costs for interveners and new rules on financial disclosure, although those last rules have not been brought into force.

A whole raft of changes were made during that period, which was only five years ago, which is not very long in the history of judicial review for seeing the impact of those changes and whether they have had the desired effect. There is not a huge amount of detailed research and evidence about the effect that they have had. Before undertaking any further reform, there is a need to examine in detail the evidence of the impact which the reforms have had so far.

I can only speak about the impact anecdotally from my experience and what the statistics show. The number of judicial reviews has gone down since 2013. In the Administrative Court there was a dramatic drop-off when the immigration cases were transferred to the Upper Tribunal. Since then, the number of cases in the Upper Tribunal in the Immigration Chamber have also gone down. In 2019, they were at their lowest level since 2013.

There has been a reduction, but the number of cases that are granted permission and the number of cases that ultimately succeed when they reach a final hearing has not significantly changed in proportions. It is hard to draw any real conclusions without looking in detail, but a tentative suggestion I would make is that these reforms have succeeded in reducing the number of judicial reviews but have not necessarily targeted unmeritorious versus meritorious, which is what they were said to be about.

Legal aid changes were designed to have an impact on provider behaviour by encouraging legal aid providers to focus more clearly on the merits. There was already a merits test before they were brought into force, but the idea was that you got paid only if you got permission, so providers would focus more clearly on that and would not issue cases that had no chance of getting permission.

The problem with that is that it is quite difficult to accurately assess merits of judicial review at the start because the public authority

defendant holds all the cards. Often you do not know the full picture until after you have commenced the proceedings. A case that appeared to have very strong merits at the start may ultimately turn out not to have very strong merits, but you will not know that until you have started proceedings.

Although there are exceptions in the rules where a public authority withdraws a decision after you have commenced proceedings, so you do not get a permission decision, you can still be paid. But if you are refused permission because of something that you found out after you started the proceedings or because of something that happened after you started proceedings, the lawyers do not get paid at all. To get legal aid you have to be pretty much destitute, so their clients cannot pay them either.

I suspect that that has had a bigger impact than can be measured, because I suspect it has led to providers who are hard-pressed and for whom it is a very unsustainable place to practice. It effectively applies a higher test than under the regulations. That is very hard to find evidence on. The impact is only just beginning to be felt now, with providers facing the impact on their financial sustainability, having brought cases for which they were refused permission and for which they will not be paid.

The other big change that was made was in relation to protection costs orders. These are in public interest challenges. They are orders that are made at the start of the case that limit the claimant's exposure to paying the defendant's costs if they are ultimately unsuccessful. On the statutory orders they have to have reciprocal caps, so there is also a limit on the amount of their costs they can recover if they win. These were introduced under the common law in order to preserve access to justice for important public interest cases and was then codified in the 2015 Act.

The biggest change that has had the most impact was that the court cannot make a cost-capping order until you have permission. The work that you do before permission is all at risk. That means that for an organisation or an individual to bring an important public interest challenge, where they need a cost-capping order, they have to be able to take the financial risk that they will be refused permission and then ordered to pay the defendant's costs of responding to the claimant at the permission stage.

There is an assumption that those costs will be modest and reasonable; the figure of around £5,000 is often talked about. But in a recent case I was involved in, in which there were two defendants, the defendants' costs at the permission stage were £15,000. You have impecunious litigants and small charities

seeking to bring public interest litigation having to be willing to take the risk of £5,000, £10,000, £15,000 of costs being ordered against them if they are refused permission to proceed. The court cannot intervene and cannot offer that protective costs cap at that stage.

The other changes were changes to the rules on third-party interventions and the no substantial difference test that Alison has talked about. On the interventions, I am not aware of much evidence of how this is applied. I am aware of one case in which an order for costs was made against someone who was applying to intervene. I am not aware of any cases where the court has decided that there were exceptional circumstances and they would not order costs where an order was sought. I do think it has had a chilling effect on organisations that would otherwise be able to bring important assistance to the court in the public interest and that are now loathe to do so because of the risk of being ordered to pay costs.

On the no substantial difference test, I understand that there have been around 60 cases in the last five years in which the court has refused to order relief on the basis of that test. There was a similar approach in the common law before it was codified in the 2015 Act. I have not seen any comparative analysis of whether it made an impact.

That is a very long answer, but there have been a lot of reforms and a lot to say about them. The main overarching thing I would say about their impact is that it is really too hard to say, and there is not the evidence or the research to say what the impact has been and to make the case for further reform.

Baroness Ludford: It does make you wonder what else can be "reformed".

Polly Glynn: My perspective, running a legal aid firm, is that a number of people phone us up every day asking us to take cases on and we do not have the capacity to do that. Legal aid is very badly paid. Even though we do not pay well in my firm, it is an expensive business running a law firm and doing litigation. Legal aid rates do not cover the costs of that.

That is shown by the fact that there are not enough legal aid solicitors around to take the cases on that would merit being taken on. The reforms to legal aid for judicial review just made that more difficult, although I joke that it gives a sense of being a gamble, or something like that, when you are doing judicial review and you might not get paid anything for all the work that you do. That is

quite annoying. I have had cases where I have not been paid because we were asking government to make a decision, and then it did but it was not a withdrawal of the decision. Then, we get refused permission on that basis and we do not get paid anything. That is in accordance with the regulations.

So although my client gets rehoused and gets exactly what he wants, and the merits are really good because the Government have made a decision, which is what we are asking for, we do not get paid. It is not fair. It is not right that we should have to absorb the costs of that. That is why there are not enough legal aid solicitors around to take judicial reviews for all the people who have deserving and sensible cases and whose human rights are currently being breached.

Baroness Ludford: Lord Dyson, do you have something to add? I am sure you do.

Lord Dyson: Not really. The procedural reforms that took place a few years ago were a result of Grayling's desire to reign in on judicial review to make it more difficult. It has had a significant effect in that direction, even though not all the reforms that he wanted to introduce then were introduced. There was a lot of opposition to what he wanted to do, but he got through quite a lot of what he wanted to get through. It has had a very significant effect on reducing judicial review.

Personally, I think that is highly regrettable. If what underlies this latest inquiry is whether further obstacles should be placed in the path of claimants, including pushing over the line the new reforms that Grayling wanted to introduce but was not able to, I would be very strongly opposed to that.

I am sure none of the witnesses before you today will support that. We would probably want to reverse some of these changes, if possible. Whether that is politically on the cards at all I have no idea. I suspect it is not. But certainly these reforms have had a very significant effect in reducing judicial review.

Q11 **Fiona Bruce:** I am Member of Parliament for Congleton in Cheshire. My question was for Alison and Polly. You have touched on it already, but if there is anything that you want to add, please do so for the record.

What mechanisms are available now to prevent unnecessary or unmeritorious judicial reviews being brought? If your answers are short, I do not think the Committee will object, bearing in mind the detail you have just gone into already.

Polly Glynn: With judicial review, the first thing you have to do is write a pre-action letter that sets out your arguments, and then you have to wait for a response. If there is a good response, you do not take the claim. If it is for somebody under legal aid, you need to apply for legal aid. If it does not have a reasonable prospect of success, you do not get legal aid. Then there are the things that we were talking about, such as the disincentive as a legal aid solicitor against taking cases that may or may not get permission.

Then you have the permission hearing. If it is arguable, the court will allow you to proceed, and if it is not they knock it on the head there. Although the court says whether the case is arguable or not, I have sat in a one-day hearing where they argue about whether it is arguable, which shows you that the test of whether it is arguable is slightly higher. It is whether it may well have a good shot at succeeding.

Unlike most litigation where you can continue and continue without anybody properly looking at the case until right at the end when the trial is held, with judicial review there are loads and loads of bits to knock out unmeritorious cases. It seems to work very well for that.

Alison Pickup: The only thing Iwould add is that, at the permission stage, the case is considered first on the papers. If the judge thinks that it is hopeless, they can certify it as totally without merit at that stage, and you are then unable to renew it at an oral hearing. That is another mechanism that exists already.

Q12 **Lord Dubs:** I am a Labour Member of the House of Lords. My apologies for not being here at the beginning, but I was dealing with an amendment to the immigration Bill in the Chamber before I was able to join you here.

Is there any way in which judicial review could be streamlined without affecting the rights of victims?

Alison Pickup: I have a few suggestions for how it could be streamlined. There could be small procedural changes. The most overarching one would be improving the quality of decision-making, which would reduce the number of judicial reviews and pre-action matters. Then there would be increasing the availability and effectiveness of other mechanisms for resolving public law disputes, such as tribunals and ombudsmen services, and improving access to early legal advice. If people have an early opportunity to understand the merits and strengths of their claims with the benefit of legal assistance, that could help to streamline judicial review.

Then there are specific issues to do with the procedure. Polly mentioned the importance of the pre-action protocol in ensuring that unnecessary or unmeritorious claims do not have to be commenced. One of the difficulties with the current time limits is they cannot be extended by agreement. Sometimes you find yourself, for good reason, right up against the time limit, and a public authority defendant will say, "Can we have another 14 days to respond? We think we might be able to agree something here", and you have to say, "No, because I have to go to court. We cannot agree an extension". So being able to agree an extension of the time limit would increase the opportunities for negotiation and may reduce the number of claims further.

My final suggestion relates to the current system in which the claimant files their grounds, the defendant files summary grounds defence, and it goes straight to a permission decision. I would argue for making provision for the claimant to reply to the defendant's summary grounds defence before it is considered on the papers by the judge. That would reduce the number of renewals that take place, because very often you have a very good point to make in response to the defendant's summary grounds defence but you have no formal opportunity to make it until after the judge has first looked at it on the papers and decided whether we can get permission. Those are my positive suggestions for reform.

Polly Glynn: I would echo all those. The only other couple I would add is that in the pandemic it has been possible to lodge judicial reviews electronically, which has been incredibly useful and makes it much quicker. The judicial review process is generally much more streamlined and straightforward than most court proceedings, so that should be retained.

The court should be more welcoming to third-party interventions. They can often be very useful for hearing arguments on an issue that would not otherwise be heard and for avoiding another repeat case on the same thing where that argument has to be advanced.

Also, we should not have to apply for cost-capping orders right at the beginning of an important case that can be taken only by somebody who can be sure that they will not be liable to the other side's costs. That can be done at issue stage rather than at permission stage, by which stage they can withdraw and they have to pay the other side's costs if they do not get the cost-capping order. That is a retrograde amendment.

Q13 **Ms Karen Buck:** I am Member of Parliament for Westminster North. This is a question primarily for Lord Dyson, but if anyone

else has an extra point that they would like to contribute, please do so.

What is your view of the role and the expansion of third-party interventions? What do they bring to the judicial review process, and who should bear the cost?

Lord Dyson: I am a fan of third-party interventions in appropriate cases. In the Court of Appeal and in the Supreme Court, I had valuable contributions from third-party interveners. There are a number of benefits to third-party interveners. They can look at the issues more broadly than the parties and they are not necessarily concerned to win the case. Their role is to assist the court by putting arguments before the court, some of which may not have been put before the court by the parties.

The courts have become very astute at controlling third-party interventions. In many cases, they will say, "You can put your submissions in writing. We won't have them orally". In some cases where they think that oral submissions can be useful, they will usually limit them to a period of 20 minutes or half an hour and no more. The courts have become good at sniffing out interventions that are likely to add value and those that will not. I am a fan in appropriate cases, which tend to be the big important cases raising issues of wide importance.

One of the reforms that were introduced by Grayling on costs did concern interveners, and there are some fairly sophisticated provisions for costs of interveners. I do not know the statistics—others may know them—but I would be surprised if they have not had something of a chilling effect on the willingness of interveners to intervene in appropriate cases.

I am not privy to the statistics, but there are now provisions; I think Section 87 of the 2015 Act gives the court the power to award costs against an intervener in certain fairly extreme circumstances. I see no justification for further tightening up those and disincentivising interveners because of a threat of a potential costs order against them. They serve a very valuable purpose and we should welcome them and not do anything to make life less attractive for interveners to intervene in appropriate cases. They are responsible people, and usually, in my experience, they instruct counsel of the very highest quality. The top counsel in public law cases want to do cases for interveners. I am not privy to the costs arrangements between them. Interveners submissions are usually of a very high order.

Ms Karen Buck: If anyone else wants to contribute a line please do so. Otherwise, I will move on to the last question.

Alison Pickup: I would just make one point. I agree with everything Lord Dyson says, and it is very nice to hear from him and his experience of the value of interventions.

Often when we talk about third-party interveners, people always assume that we are talking about NGOs and charities intervening, but anybody can intervene or can apply to intervene. It is always controlled by the court. A recent example is the case of Bridges before the Court of Appeal, which was about automatic facial recognition technology. There were four interveners: the Secretary of State for the Home Department, the Information Commissioner, the Surveillance Camera Commissioner, and the Police and Crime Commissioner for South Wales. That is very different from what a lot of people think of when we talk about interveners. I wanted to make that point about the range of organisations and bodies that may intervene in a case.

Q14 **Ms Karen Buck:** My last question slightly overlaps with the question that Lord Dubs asked you about suggestions for a review. Do you see the review of judicial review as being entirely a rear-guard action, or is it an opportunity to be able realistically to put forward ways in which the arrangements can be improved?

Lord Dyson: Broadly speaking, I think the system works very well. I should declare that I have been chairing a working group set up by Justice to put in some response to this inquiry. Professor Young is also a member of that working group.

We have included in our response one or two suggestions for improving arrangement, but they are fairly minor and technical, so I do not think it is appropriate for me to go into those. The system works very well. There are those who think the pendulum has swung too far in favour of respondents and against claimants, and I can understand that. But being realistic, the chances of this Government reversing the trend are very remote.

The way I have been looking at this is to consider whether there is any justification for making it more difficult for those wanting to bring judicial review proceedings than in current years. I do not believe there is any justification in taking that course.

Ms Karen Buck: If I was to cheekily push you and ask whether there was one improvement that you would seek to make, what might it be?

Lord Dyson: Alison will remember the detail of this better than I, but we had a suggestion about enabling a court—rather than declare a decision null and void, because if it was made null and void it would be as though it was never made and it would have no

effect—to suspend the effect to enable the respondent body to remedy the defect in the decision. Currently the court cannot do that. That is a fairly technical point, which I doubt would be very significant in many cases.

Perhaps we can ask Alison Young, because she is more au fait with it than I am.

Professor Alison Young: It was recognising that in some situations, for example, the court finds that a decision of the Executive was unlawful, so that would normally be quashed and so would be void. But if, for example, that was to uphold an international obligation in particular circumstances, that might have various knock-on consequences, so rather than forcing Parliament into a position where it had to retrospectively approve a measure until it could bring in new measures that would be in line with international obligations, we could think of the possibility of having a kind of "It's unlawful, but it will only take effect in a few months to allow that". It would be very important to make sure that that was on very specific and narrow grounds, and only where needed, because otherwise there may be other knock-on consequences for upholding the rule of law, such as not being able to uphold international obligations.

If you were to push me to any other possible reform, it would be nice to have a move towards a general duty to give reasons rather than the system we have at the moment where there is no general duty in the common law but various exceptions where you are required to give reasons. That would add clarity. It would also improve decision-making in administrative bodies, as long as you had certain exceptions where that would not be possible and they were narrowly and carefully drawn.

It would aid the courts when they are dealing with these complex issues, because then they could look at the evidence and scrutinise the decision, so it would be very clear that what the court was doing is scrutinising this to make sure that administrative bodies were acting in the proper scope of their legal powers.

Polly Glynn: It is always good to be optimistic with these things and try to be productive. The terms of the inquiry and the questionnaire are, "There's a problem with judicial review, and how are we going to sort it?" I do not accept that that is the case.

It seems incredibly rushed. If you conduct a wholesale review of how government is policed by the courts and how you make sure that the laws are obeyed, you want proper evidence about that, and studies, and to go into it in-depth. Instead, we have a rushed

thing that will happen very quickly and before Christmas. It seems that more time is spent thinking about whether to build a block of flats than this.

It is of concern, because I think they will jump to easy political answers and not think about what they are doing. That is a shame, because judicial review is one of the good things about our democracy; that anybody can take a government decision, if they can get a legal aid solicitor or if they have the money, and say, "That's not what the law says you should be doing". That gives Parliament real power. It is a shame that we will chuck that away with an ill-thought-out review.

Alison Pickup: I share some of Polly's concerns about the speed with which this review is being conducted. However, going back to what I said at the outset, one of the barriers to judicial review being an effective mechanism for protecting human rights and for ensuring government accountability is the costs of judicial review. Legal aid is very limited, and people who are not eligible for legal aid have not only their own legal representation costs to pay but the risk of being ordered to pay their opponent's costs if they are unsuccessful. In 2017, Lord Justice Jackson carried out a very detailed inquiry as part of his supplemental review of civil costs, in which he made recommendations for reforming the cost rules in judicial review by introducing an exception to the rules that apply in environmental claims, which would have increased access to justice by limiting people's cost exposure when bringing judicial review claims.

The Government consulted on some of those proposals last year, and we are waiting a response and a final decision within the Government. If I was to call for one change, it would be to implement those proposals.

Chair: Thank you very much to all our witnesses. You have been admirably crystal clear, with no gobbledegook or complexity, on what this means for the rule of law, what it means for the supremacy of Parliament when it makes a decision, and what it means for redress for individuals. You are urging that the system should be improved rather than undermined. Thank you very much in helping us to prepare our evidence to this review. Thank you to the Members of the Committee for posing their questions. That concludes this session.