HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Judicial review and human rights (non-inquiry session), HC 321

Wednesday 16 June 2021

Watch the meeting

Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Joanna Cherry; Lord Dubs; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; Angela Richardson; Lord Singh of Wimbledon.

Questions 1 – 11

Witness

I: Lord Faulks QC, Chair, Independent Review of Administrative Law.

Examination of witness

Lord Faulks.

Q1 **Chair:** Good afternoon everybody, 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 and half are Members of the House of Lords. As our name suggests, we are concerned about human rights.

We have an evidence session today looking at whether or not the Government and their agencies and public bodies comply with human rights and whether or not individuals can get their rights enforced. We are looking specifically at the role of judicial review in that. The Government have had a commitment to changing judicial review, and they set up an independent review of administrative law, chaired by Lord Faulks QC. We are very grateful to Lord Faulks for joining us to give evidence today. The review has been published, and since then the Government have come out with a consultation document, so this is very much a live issue and we are hearing from the horse's mouth today.

Members of our committee are looking forward to asking questions that will shed light on how the review and the Government's consultation can affect human rights protections, what role judicial review plays in upholding the rule of law, what any changes proposed might do to help or deter individuals in enforcing their rights, and whether there are any changes that could or should be made to make the process of judicial review more efficient.

I will ask a general question to begin. Could you explain, in a nutshell, what judicial review is? I understand that the latest figures are that there were 2,800 applications for judicial review in 2020, which is down 16% on 2019. Do we have too little or too much judicial review? Why, in your view, is that figure falling? Why do you think it is important for the judiciary to be able to test the lawfulness of the actions, decisions and policies made by government and other public bodies? What role does judicial review play in the protection of human rights? Can it help to improve decision-making by the Government and public bodies? That is quite a lot of questions in one, but we look forward to hearing from you.

Lord Faulks: Good afternoon, and thank you very much for the invitation. Yes, you have asked quite a lot of questions, and I will try not to go on too long in answering—or attempting to answer—them.

First, what is judicial review? Judicial review is the legal procedure by which decisions of a public body can be challenged. It is a review rather than an appeal, so a court is concerned with the legality of the decision: whether the decision-maker took into account irrational matters or whether the procedure was flawed. It is concerned with the review of the decision, rather than with the decision's merits. Judicial review is an umbrella term. The remedy of judicial review dates back to prerogative remedies from way back—the ways in which government acts and decisions could be challenged in the courts.

The role of judicial review is extremely important. The judiciary is an essential part of our constitutional arrangements, which are usually divided into the legislature, the Executive and the judiciary. The judiciary provides an extremely important safety valve to prevent the Executive overreaching themselves and making decisions or acting in a way that is unlawful. In my view, that is a fundamental part of the rule of law, and I do not think that this is contentious.

Of course, the remedies under judicial review include human rights in the technical sense under the Human Rights Act, but they include all rights that can be upheld as a matter of law. The process enables courts to decide whether a decision or act is unlawful and then to give a remedy as appropriate.

You asked whether it makes for good government or good decision-making. I think that is a contested space. The overwhelming view now is probably that judicial review is a useful discipline; it is most important that Governments act lawfully. That may sometimes seem to Governments quite a difficult thing to do, particularly when there is perceived to be a lack of certainty about what the law is.

Perhaps an indication of the change of attitude can be obtained from a document prepared by the Treasury Solicitor's Department, *The Judge Over Your Shoulder*. When that was first published, in 1987, the tone was, I think, a little hostile to judicial review. It said that judicial review exists in part because of "an increasing willingness on the part of the judiciary to intervene in the day-to-day business of government, coupled with a move towards an imaginative interpretation of statutes". That approach has rather changed in the more recent version of JOYS, which is a pretty substantial document but one that is helpful for all civil servants because it summarises what the law is. The tone of the editorial is very much, "This enables you as a civil servant to advise Ministers to act lawfully. It enables the Government to ensure that they act lawfully". Of course, it is easy to state that, but dealing with particular decisions and acts can be challenging.

Chair: I certainly remember, as a Minister, many times making proposals and being advised by the lawyers within the department or the Treasury solicitors, "Well, you might think that's a cracking good idea, but actually it's outwith the law that has been passed by Parliament, so you can't do it". I remember it well from that point of view.

Q2 **Lord Brabazon of Tara:** Good afternoon, Lord Faulks. The 2019 Conservative manifesto pledged to prevent judicial review becoming "politics by another means". Is that the position as you see it?

Lord Faulks: That particular phrase is actually a quote from a Court of Appeal judge in a case called Hoareau. I think everybody acknowledges that there can be occasions where judicial review is abused. Judges should be, and generally are, astute in recognising what is a genuine challenge based on the fact that something is unlawful, as opposed to

someone simply disliking a policy and trying to shoehorn that dislike into one of the grounds of judicial review.

The Conservative Party manifesto originally suggested that there would be some great constitutional convention or report, but the party has since decided that it would be better to use bite-sized chunks, as it were, to consider different aspects of the constitution, one of which is the function of judicial review. There is an argument that judicial review has expanded in scope considerably, and the Government wanted to find out whether that was so and, if so, whether anything should be done about it. That was the context in which we as an independent body were asked to report.

Lord Brabazon of Tara: You have said previously that "a degree of conflict" between the judiciary, the Executive and Parliament "shows that the checks and balances in our constitution are working well." Why do you think that that is the case?

Lord Faulks: That is a fundamental part of the rule of law: the Executive's acts should be capable of challenge by the courts and by judges. It is inevitable that there will be conflict from time to time: as the Chair explained, a policy may seem like a good idea but may run into difficulties in terms of whether it is unlawful. As far as Parliament is concerned, this was one of the aspects of our report that we thought was rather unsatisfactory, in the sense that the terms of reference suggested that it was about a potential conflict between the Executive and the judiciary, whereas, of course, Parliament has a very significant role. Parliament should not be regarded as supine, but will be looking at particular provisions that the Executive bring forward in legislation.

All the parts of the constitution should, in my view, be working as checks and balances on each other, so that one part should not become overmighty or overpowerful. That of course goes for the judiciary as well. We have seen the checks and balances particularly in relation to the Brexit process: there was an example of the law clearly providing a check on the decision of the Prime Minister, for example, in the prorogation case. Whether you thought the decision was right or wrong, it was nevertheless a clear illustration of the constitution working.

Chair: So judicial review is basically the judiciary making sure that the Government abide by the decisions that have been made by Parliament, which is the elected legislature. The point that you made about it not being about the Executive versus the judiciary, but the judiciary supporting the will of Parliament and ensuring that the Executive abides by that, is a very helpful frame for it. I take it that when you say judicial review can be abused, you mean abused by claimants rather than by the judiciary.

Q3 **Lord Dubs:** You have noted that where "legislation is clear, there is little scope for judicial review." Can you give us some examples of that? What can be done to ensure legislation is clearer? I have sat in on a few judicial review decisions in the High Court on refugee and asylum cases. I am

bound to say that it might have been quite difficult to make the legislation clearer than it was.

Lord Faulks: I very much defer to your experience in this area, Lord Dubs. You are right that the law in relation to immigration is particularly impenetrable. I think the Law Commission is looking at the Immigration Rules at the moment, in order to try to bring some clarity.

One has to be realistic: it is very difficult for Parliament to legislate and prescribe for every single situation in a way that may cover a factual scenario. But on the whole, while regulation-making powers are inevitable in most statutes, the question is: does the exercise of power under the regulation flow from the statute or is it outwith it and based on some other power? Ideally, Parliament should make itself clear, and if it does then there is not really much room for judges, as it were, to second-guess what Parliament intended. They should be looking at the natural and ordinary meaning of the statute. There are various means of interpreting statute, of course: the so-called principle of legality, which has become very much in vogue in case law recently, is that in examining a particular act under an Act of Parliament, the act must be exercised so as not to abrogate fundamental values, unless that is clear from the statute. That has some relevance to your committee, as it is a way of trying to ensure that the interpretation is consistent with a way that protects human rights.

I cannot say that the statute is often going to be so clear in every single respect that judicial review is entirely impossible. In the area that you discussed, I suspect there would be a number of circumstances, as we can see from the figures, in which there could be challenges by way of judicial review—some successful, some not.

Q4 **Baroness Ludford:** Thank you very much for giving us your evidence, Lord Faulks. When the independent review of administrative law, which you chaired, considered the role of judicial review in the UK, it concluded that there was not a strong case for "radical reform" of judicial review. Could you explain why you came to that conclusion?

Lord Faulks: We approached the whole question of judicial review with an open mind. We were given an enormous amount of material to help us in our deliberations, and I think the panel probably came to the issue with slightly different preliminary views on the matter. We were not concerned on the whole with trying to decide which way we would have decided a particular case, because there might not have been agreement on that. Rather, we wanted to look at whether we thought there was something structurally awry with the whole question of judicial review.

We came to the conclusion that we did not think the legislation would help in terms of codification, or in trying to set out in an Act of Parliament the various grounds for judicial review. We thought that, overall, the way that judicial review worked was satisfactory; but we absolutely accepted that it was perfectly in order for Parliament to decide to reverse a particular court decision. That obviously would not be done every day,

and we suggested that a Government would think long and hard before doing that, but that there was nothing wrong with Parliament choosing to do it. That is, after all, parliamentary sovereignty.

In the course of our report we discussed one or two cases that, frankly, could have been decided either way. But we did not think the fact that we might not agree with a particular decision in this field was an indication of something fundamentally wrong with judicial review. In other fields of law there are disagreements between judges, between academics and judges, and between different academics, but that does not make the whole process flawed. Inevitably, cases that go to the Supreme Court, or even the Court of Appeal, will be those where there are more than respectable arguments on both sides. So despite having a number of cases drawn to our attention and examining them closely, we did not think that there was something so badly wrong with judicial review that we should start again. It is a well-established method of testing the legality of actions, and any decision to do something about it radically would, we think, be wrong and potentially contrary to the rule of law.

Baroness Ludford: If I might follow that up, the Lord Chancellor said that your analysis "identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made". Do you consider that a fair interpretation by the Lord Chancellor of your findings?

Lord Faulks: I obviously looked with interest at what the Lord Chancellor said in response to our report. I have to say that was not the language that we used in our conclusions. What we said, and for anyone who is interested this comes at paragraph 2.94 of our review, was: "It is arguable that in the past 40 years the courts have—in some cases—decided to regard as justiciable certain exercises of public power (or issues relating to those exercises) that should have been regarded as non-justiciable." The question of justiciability is essentially: is this something that the courts ought to get involved in?

I said at the beginning that questions about considering the merits should be outwith a judicial review. Of course, judges are human beings; if they are wholly out of sympathy with the merits of a decision there may be, arguably, some circumstances in which they would be more inclined to find that there is an unlawful element in the decision or act. They should not do so, and I do not think that for the most part they do, but in very narrow cases which could go either way there may be an element of that. But we did not think that was an overall drift; we just thought there were some cases that, frankly, were a bit contentious and about which there was quite a lot of disagreement.

David Simmonds: I would be grateful if you could just clarify something for me. What is the process whereby there is a conflict between legislation that is held by different government departments? I offer by way of an example the National Transfer Scheme that is designed to enable asylum-seeking children to be transferred from one local authority

to another, where the Children Act 1989 says by the operation of law the child becomes the responsibility of the local authority where they arise. The Home Office is seeking to use powers that it has under immigration legislation to move people, and we are seeing young people who do not want to be moved challenging the potential for that decision, citing the Children Act 1989. As I understand it, both are right and they both have a legal basis on which to rely. How would that be resolved?

Lord Faulks: I am not an expert in the field, so I would not venture a definitive decision on this. Quite often the courts have to consider whether or not a particular act can be traced back to a particular statute. It does not sound like very good law-making, but there may be an apparent conflict. Frankly, there is no simple answer to these things. The courts will look overall at what the basis of the particular decision was, whether it is founded adequately in statute and so on. There was a recent case in which very similar circumstances arose, and it took many, many paragraphs before they finally decided that the overall statute did not justify the regulation. I am afraid these cases turn on their particular facts; There is no magic solution.

Joanna Cherry: To go back to the question before the one from David, Baroness Ludford asked about the conclusion you reached in your review, and you read out paragraph 2.94. Do you think perhaps the Lord Chancellor was a bit disappointed at the conclusion you reached?

Lord Faulks: That may be the case. He did not officially say so, but the decision by the Government has been to consult—I think that they have finished now—on various changes that go beyond those that we recommended in our report.

He may or may not be disappointed, but I should say that this was an independent review of administrative law; we were not in any way interfered with by the Government in producing our report. We were in fact set free from officials entirely, which was a considerable hurdle, in the sense that there was a lot of work to do in quite a short space of time. We were asked to do that, and we tried to deal with all the different issues that were raised.

The only area where there was a conflict, as it were, between the government and me as the chair, representing the panel, was this: we were very keen that there should be as much publication of all the responses to the review as possible, so that everyone could see what different parties and organisations had said. I certainly thought that it would be useful if we got as much on the record as to what the different government departments thought. That was because, on the last occasion when there was a change in the law, in the 2015 Act where there were certain moderate changes to judicial review, a paper from the Ministry of Justice contained a number of assertions but did not actually give any evidence as to what government departments said. We were then provided with lots of information and some submissions from government departments. I was very anxious that those should be

published, so that people could weigh up the difficulty that government departments confront, just as individuals confront these cases.

There was a feeling that the Government expressed, which was that there was a difficulty with Cabinet responsibility and different departments had different views. The compromise that was finally reached was that there was no interference with any of the contents of our reports but the government departments were effectively anonymised. There was then, subsequent to our report and to the Government's response to our report, a further document summarising all the Government's submissions.

So in a roundabout way, albeit in the absence of specific identification, we have now got the Government's position, or at least that of some government departments. It is true that some government departments clearly feel that judicial review has gone too far.

Probably the best way to summarise it is this. There was a submission from Lord Neuberger, former President of the Supreme Court, in which he expressed the view that a degree of flexibility was very desirable in judicial review. That is precisely the converse of what a government department seeks; it wants to know with some degree of certainty, if it is going to bring forward a particular policy, that it is not going to be challenged in the courts. Then there are some areas that have traditionally been regarded as non-justiciable; for example, foreign policy decisions and the like. But it is true to say that, in the view of some government departments, that has been somewhat eroded, and there are rather few areas that are wholly outside the scope of judicial review. So that is a conflict.

Clearly, there are other areas that the Government are concerned about: ouster clauses, and maybe someone is going to ask me about them in due course, and a wider approach to the remedies that are available under judicial review.

Joanna Cherry: If, as you say, it became apparent that some government departments think that judicial review has gone too far, that would tend to suggest that some others think it has not gone too far and are quite happy with it.

Lord Faulks: I think it is fair to say that some government departments are reviewed fairly often, such as the Home Office and the Ministry of Justice. Other departments tend to escape any judicial reviews, and are therefore probably less likely to be concerned with it. That may be a partial explanation.

Q5 **Joanna Cherry:** Can I ask you about one of the recommendations you made? You said that Cart judicial reviews should be cut back. These are named after the Cart case in England, and in Scotland it was the Eba case. This allowed decisions by the Upper Tribunal in immigration and asylum cases to be subject to judicial review in the High Court. We have heard that these cases often engage with fundamental human rights such

as the right to life. Can you tell us why you reached the conclusion that Cart judicial reviews should be restricted?

Lord Faulks: I personally was quite influenced by a lecture given by Lord Carnwath, the former Supreme Court judge, who had particular experience in this area. He had been closely involved in the preparation of the relevant legislation that set up the Upper Tribunal. In his lecture, he confirmed that his intention was that the Upper Tribunal should, within its specialist sphere, have the status of the High Court, and thus be immune from review by the High Court. His expectation was that the designation of a superior court of record would have that effect. I think that was generally thought to be the case. The idea was to have a specialist court. There is of course an inferior specialist court—inferior in terms of its status rather than in the quality of its decisions.

It is rather odd, at first sight, that a superior court of record should none the less be subject to potential applications for judicial review. When I read the Cart judgments in the Supreme Court, I could see that there was some nervousness about whether or not there should be a potential for judicial review. The tenor of the judgments was, "If they are getting something fundamentally wrong, perhaps there ought to be some commission or judicial review involved." But the tone was that that should be very exceptional.

Indeed, one would not expect a specialist tribunal to make fundamental errors of law on a regular basis. So we went from there to look at the statistics, which showed that there were in fact an enormous number of applications—more in this area than in any other. The Supreme Court said, "'Look, this isn't intended to be a third bite of the cherry once you have already tried twice'". One can wholly understand why someone, to put it neutrally, whose human rights might be infringed would want to try every conceivable avenue to give them another chance. At the same time, the number of applications, given the very restrictive way in which these appeals were envisaged to take place, seemed to us to indicate that the very fear that was discussed in Cart had in fact manifested itself. I was also influenced by what the original intention was.

I know there has been some criticism of our use of statistics. We have the statistics set out clearly in the report, at paragraph 3.45. Incidentally, those were not the only statistics that we had. We took the view that as many statistics as we could get would be helpful, because there is an awful lot of assertion about judicial reviews, so the more evidence that we had the better. In fact, there is a considerable amount of our report that gives a clear indication of the way in which judicial reviews have proceeded.

The criticism of our use of statistics is not that they were wrong per se, but that we have described a very small number of positive results and various practitioners have said, "Actually, we did get permission; we may not have got a positive result as you define it, but we nevertheless got some advantage from getting permission to appeal". But I do not think that there are any hard statistics the other way.

My view is that the sheer number of applications does, I am afraid, show that these are being used as a third bite of the cherry, which is what the Supreme Court feared.

Joanna Cherry: I wonder if I might put to you the specific criticisms of the statistics that you used in relation to this conclusion on Cart, set out in a blog by the Public Law Project and also supported by the independent cross-party group JUSTICE in its submission to the government consultation. I shall summarise what they say: your report states that a very small figure of these were successful—0.22%—but this is based on a misassumption that all cases that were not reported were failed Cart judicial reviews. But the Public Law Project and JUSTICE say that there is no basis for that assumption because the specific streamlined procedure used for Cart judicial reviews means that they are not generally reported, and so reported cases will not be reflective of the number of successful Cart judicial reviews. Hearings and reported judgments are in fact extremely rare, especially since the majority of judicial review permission decisions are unreported.

JUSTICE says that it also understands from practitioners that they have experienced and represented individuals in many more than the 12 successful judicial reviews that your report refers to. It has also been noted by the Public Law Project and JUSTICE, and indeed by colleagues in my own jurisdiction in Scotland, that your figure does not include any consideration of Eba judicial reviews in Scotland, which the Government are also proposing to remove.

Could you give us a rebuttal of these statistical criticisms from the Public Law Project and JUSTICE? That is perhaps a bit complicated for this session and it might be something that you would want to write to us about, but it seems to me that there is some substance to the criticisms made by the Public Law Project and JUSTICE of the basis of your report's statistical analysis.

Lord Faulks: If there are better statistics then that is important. I think the Government have said that they will be more than happy to look at any other statistics that are available.

Joanna Cherry: It is not so much that they say that there are better statistics but that the statistics that are available were misconstrued in your report—I think that is really what the Public Law Project blog and JUSTICE are saying. It is quite important that we get a detailed position on this. Ultimately, we need it from the Government but it would be interesting to hear yours, as the statistics come from your report.

Lord Faulks: The table sets out the total number of applications, how many reports or transcripts of cases involving a Cart JR we were able to find on Westlaw or BAILII for each year, and how many of those cases had a positive result, and we defined what a positive result is. So our statistics do in fact speak for themselves. As I said earlier, I readily concede that there may be other successful applications about which there are no records, and if there are better statistics then fine, the

Government ought to take them into account. I cannot give you any better statistics.

Joanna Cherry: The point is that, in the majority of cases, Cart judicial reviews are not reported, so they will not be on Westlaw or BAILII. Merely using the reported cases is not reflective of the number of successful Cart judicial reviews. That seems to me to be a very important distinction.

If, as you say, it was one of the planks on which you reached your conclusion that Cart judicial reviews were falling into the trap that had been identified by the Supreme Court justices, and if those statistics are skewed, it rather undermines your conclusion, does it not?

Lord Faulks: I do not think that is does actually. As I say, I am perfectly ready to accept that there are other figures, although I do not think that any of the figures you have discussed are very hard—they are rather anecdotal. There may be more successful applications than we have been able to record by way of hard evidence.

What is significant is the sheer number of applications. If you have a total of 5,500 applications between 2012 and 2019, it shows either that the Upper Tribunal and lower tribunal are incredibly incompetent and are ignoring all sensible legal guidelines, or that these applications do not contain any real merit. For example, I shall quote what Lord Carnwath said in his report: "The consequence has been described to me informally by one experienced administrative court judge: 'I would say that for every 10 days that I sit in the Administrative Court one day is occupied with dealing with spurious *Cart* applications. The rate of grant of permission for judicial review is minuscule'". That is anecdotal evidence but it comes from a judge sitting in the administrative court.

Joanna Cherry: I am not suggesting that we should not put any value on his anecdotal evidence, but you said that you based your decision on both what he said and the stats. What I am saying is that the stats are incorrect because they proceed only on looking at reported cases, which are only a tiny fraction. For example, if you look at JUSTICE's response, it notes that stats published by the Ministry of Justice for judicial review claims in England and Wales—again excepting Scotland—suggest that 6.26% of Cart judicial reviews were successful between 2012 and 2019. That is an awful lot more than 0.22%. Six out of 100, where someone's right to life is at stake, might be rather an important figure.

Lord Faulks: I have read the JUSTICE submission, and even it concedes that there are an awful lot of applications, even on that figure, that are clearly without merit. I think it suggests that there should be some educating of lawyers not to take applications that are not well founded.

I do not want to repeat myself; there may be further applications, but I am not convinced that that undermines the recommendation—but of course it is the Government's decision, not mine. If our statistics can be supplemented or contradicted then that is a matter that has been drawn

presumably to the attention of the Government in JUSTICE's submission and other submissions. They will be able to decide whether they feel that there is a sound basis for any reforms that they want to bring forward. I do not speak for the Government, of course.

Q6 **Joanna Cherry:** May I ask you now about the recommendation of introducing suspended quashing orders? These would allow the courts to give public bodies a certain amount of time to correct an unlawful act, instead of immediately striking it down. The Government have proposed that these would be mandatory, so suspending a quashing order would be mandatory rather than discretionary. What is your view as to whether suspended quashing orders should be optional or mandatory?

Lord Faulks: Our recommendation, in paragraph 3.57 of our report, is that there should be an option of awarding a suspended quashing order. It is fundamental in judicial review that there should be a degree of flexibility in the remedy that is available to a court. A criticism that has been advanced from time to time is that quashing orders are rather a blunt instrument. There are occasions where greater flexibility is important to do justice in a particular case. I have to say that I do not like the idea of mandatory anything in this context; I prefer the idea of an option, because individual cases will vary, and in some circumstances it might not be appropriate for there to be a suspended quashing order. Generally speaking, remedies in judicial review are discretionary, to take into account the particular facts of a case.

Joanna Cherry: Do you think mandatory suspended quashing orders would have any negative implications for the enforcement of human rights, particularly for people securing effective, timely remedies for breaches of their human rights?

Lord Faulks: What sort of factual scenario do you have in mind?

Joanna Cherry: The JUSTICE response to the consultation gives a couple of factual examples. There may have been a misunderstanding at some point, not by your independent review but perhaps by the Government, that JUSTICE supported mandatory suspended quashing orders. It is very clear in its response to the consultation that it does not; it says that prospective-only remedies risk substantial injustices to persons impacted by the unlawful decision or delegated legislation and that they are generally contrary to the rule of law, including certainty. So where a decision has an immediate impact on someone's human rights, you would expect it to be quashed, at least in so far as they are concerned, otherwise their human rights will continue to be unfairly impacted. Am I right about that?

Lord Faulks: That is why I asked you about the facts, because they are of course terribly important. I understand why it is difficult to come up with a particular example, but I return to my answer that flexibility is very important: there might be situations where someone's human rights are impacted, in which case a suspended quashing order might not be the appropriate response. But I think it is reasonable for the Government to

think of a degree of flexibility. This is my view, as you are not asking the panel here, but we recommended the option of a suspended quashing order rather than a mandatory provision of one.

I should perhaps say, and this is partly in answer to the previous question, that those two fundamental recommendations have been reasonably well received by judges, among others; in debates in the House of Lords; and in webinars. I am not sure they are terribly controversial. In fact, the Government may want to go further. I am not part of the Government's consultation and I have not seen any draft Bill, but I think they should proceed with considerable caution before making any remedy mandatory.

Chair: Is it true to say that, if there were a question of a suspended quashing order, the parties to the case would be able to make submissions as to whether or not it was appropriate in that particular case? That is your point about the discretion: it leaves it with the court, not only as to its finding but what should be done about that finding. What the Government are saying is, "Take that away and make them suspended."

Lord Faulks: That is quite right. These cases are fact-sensitive.

I should say something that is of importance to the committee: maybe you are going to come on to ask me about it, but we were not asked specifically to consider the Human Rights Act. That is the subject of a separate consideration by Sir Peter Gross and his panel. It is important to the extent that, whatever reforms in this space the Government decide to bring forward and get through Parliament, it will make no difference to any application for judicial review under the Human Rights Act. Parliament has passed that Act and judges have an obligation to consider applications for judicial review in accordance with it. It is not a question of their deciding that they want to; they have to because they have an obligation. To that extent, in the absence of any repeal or amendment of the Human Rights Act, that Act will still be in play, unamended by any provisions that may be in the legislation that is contemplated.

Q7 **Baroness Massey of Darwen:** I am a Labour Member of the House of Lords and I have a couple of questions for you about the Government's response to the consultation. First, after the publication of your report, the Government held a six-week consultation into judicial review reform. The Constitutional and Administrative Law Bar Association said that the consultation proposals "misunderstand the IRAL report, its terms of reference and its conclusions." Do you agree that the government consultation misunderstands the report?

Lord Faulks: I have already pointed to a conclusion that does not reflect entirely what the Government said they were saying. We discuss in the report the various different points of view about judicial review, including, for example, Lord Sumption's Reith Lectures, and law's expanding empire, and we came to the conclusions that we have come to. The Government have perhaps put a certain gloss on our conclusions that I

must admit I did not think were there, but that is their interpretation of our conclusions.

I do not think the Government have misrepresented the report, but they have decided to interpret some of the main body of it in a way that they think informs the consultation. Of course they would be perfectly entitled to ignore the report altogether; we were not a government body but an independent one. They might have said, "Actually, you go too far", or, "We want to go further." Still, I would much rather that they simply stuck to our conclusions and then said, "We don't entirely agree with that", rather than recasting our conclusions in a way that was not entirely reflective of what we said.

Baroness Massey of Darwen: That is very interesting. My second question is the following. The Bar Council said that the Ministry of Justice's six-week judicial review reform consultation was inadequate "not only because of its shortness but also, and more importantly, because of a lack of analysis of how the proposals would actually work". Do you think this is a fair criticism of the consultation?

Lord Faulks: Both our report and the six-week consultation have been done at considerable pace. That is a short time, because these are big issues. Here I am not speaking for the Government, nor am I even speaking for the panel, but I suppose it could be said that those who are interested in this issue will have already provided some detail—in fact they did; we had more than 2,500-odd pages of submissions—so they are on top of the issue. But I agree that it is a short time. They have to consider ouster clauses, for example, which are quite a difficult subject, as well as what the Government propose in that regard. Already tight timetables have been made even more difficult by Covid and so forth, so I agree that the timing is tight.

Q8 **Chair:** I would like to bring us on to the subject of ouster clauses. The Government's consultation includes measures that your review did not recommend. In particular, the Government have proposed to clarify the effect of ouster clauses in legislation—that is, clauses to exclude judicial review of Executive action. What do you think are the merits of that idea? Do you think there are risks associated with Parliament legislating to clarify and expand the role of ouster clauses?

Lord Faulks: It is a fairly novel idea. Ouster clauses have appeared over the years in a number of different Acts of Parliament. They go back to a case called Anisminic, which all law students learn about, and more recently in a Privacy International case and in a number of others. The courts, I think it would be fair to say, are somewhat hostile to ouster clauses because the rule of law means that government actions should be subject to judicial review, and excluding judicial review is something about which the courts need some persuasion that a particular clause has effectively done that as a matter of construction. There are those who suggest that the courts have taken a somewhat unrealistic view—that because they are so hostile to ouster clauses, they interpret them in such a way that they do not have any effect—because they are worried about

the rule of law implications of a clause removing the courts from the picture and thereby giving the Government carte blanche to do what they want.

It seemed to us, and this was in our conclusion, that it was perfectly reasonable for the Government to put forward, and Parliament to pass in appropriate circumstances, a particular provision which would result in either the limiting or exclusion of judicial review. But they should do so in only fairly exceptional circumstances where, for example, as in the Cart case, there is a specialist tribunal and it is not appropriate for courts to second-guess superior courts, or something of that sort. There are circumstances in which it is justifiable. If Parliament makes it clear, in a particular circumstance, that that is what it intends, the courts should not be, as it were, wrenching the interpretation in such a way that it does not have effect—because that is the sovereignty of Parliament and it is not paying proper respect to what Parliament has decided. But if there is an ambiguity, one can see that judges are going to be inclined to construe them as what we call contra proferentem; in other words, rather against Parliament somehow purporting to exclude judicial review.

It is suggested that there should be some general provision about ouster clauses. I will be very interested to see what is proposed, and to see some of the responses to that suggestion. It is very difficult: you are legislating in the abstract, rather than dealing with a particular fact. That is not a very good way to make law, on the whole.

There are various principles that you can extract from decisions over the years. I have noticed that they are concerned that sometimes the argument is used to say that an ouster clause is ineffective on the basis of a worst-case scenario, and so surely this could not be effective because otherwise it would oust the jurisdiction of the court in these circumstances; thereby they conclude from that that the whole clause is invalid. That is a reasonable point, but how you actually reflect that possible inappropriate response in legislation is very challenging. I shall look at this with interest.

There is some suggestion that there should be some provision whereby only in the most exceptional circumstances of gross procedural impropriety will the ouster clause not work, or something of that sort. I think it would be much better to draft ouster clauses, if you needed them, clearly, so that there is no room for the judges to rewrite them, rather than to come up with a general provision to deal with them. That is my view.

Q9 **Lord Henley:** The Government have also proposed to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis. What effect could this have on individuals who are trying to enforce human rights, including the Article 13 right to an effective remedy?

Lord Faulks: As I said in an earlier answer, in the absence of any amendment to the Human Rights Act, a court cannot embark on judicial

review, whether it is deciding whether or not a decision should be quashed or in giving a remedy, in any way that contravenes the terms of the Human Rights Act. The idea of the ability to make a prospective-only order or remedy is something that is certainly worth considering.

I do not like the use of the word "only" very much. To come back to my about flexibility, there are some circumstances in which it is rather blunt for a court to say that a particular act or decision is unlawful and to quash it altogether without giving the government body a chance to get its act together, or something of that sort. There may be circumstances in which a prospective-only remedy is a reasonable response. But to give a prospective-only remedy only risks there being circumstances in which it is appropriate to quash entirely; not always, but sometimes.

I come back to my point about flexibility. I do not think there is anything wrong in considering the remedies being more flexible, but they need to be flexible rather than rigid; otherwise you are doing precisely what you complain about, which is to say that nullity is too blunt an instrument and therefore we are going to have only this remedy. That seems to me to be wrong.

Q10 **Lord Singh of Wimbledon:** In our submission to your review, we proposed measures that could improve the efficiency of judicial review and increase access to justice for claimants seeking to enforce their human rights. This included the proposal of a new general duty for administrative bodies to give reasons for their decisions, with narrowly defined exceptions. Do you agree?

Lord Faulks: That was somewhat outside the scope of our review. I can certainly give you my views, but it is not within the terms of reference, as it were. It is always good if administrative bodies give reasons for their decisions. Whether you impose a specific duty, albeit with a narrowly defined exception, I am not sure. There is a fundamental principle that there should be natural justice and that, under Article 6 of the convention, for example, reasons would normally be given for decisions in all sorts of circumstances. So I am sympathetic to the idea that government should give reasons. I am slightly wary of confining or limiting it—"limiting" is the wrong word—and saying that all administrative bodies in all circumstances should give reasons for the decisions they make. There would have to be a considerable number of exceptions, I think. Broadly speaking, I am sympathetic to the tenor of the suggestion.

Lord Singh of Wimbledon: That is very helpful. We also noted that the risk of the adverse cost order—that is, requiring a claimant to pay their opponent's legal fees—dissuaded public interest claimants and third party interveners from accessing judicial review and from enforcing their human rights. Do you think claimants in judicial review cases should be better protected from adverse cost orders?

Lord Faulks: It is a very difficult balance to achieve. Of course one is sympathetic to those who can properly be described as public interest

claimants bringing forward claims. There is a protection of public interest for claimants provided. That was limited by the 2015 Act, so that you got the protection only if you had permission to proceed with the judicial review. This was to stop people, as it were, having a go with anything, regardless of its merits, because you have to surpass the initial permission threshold. There was a case for that. Although it is right that people should have a chance to vindicate their human rights, it is also right that the Government should be able to carry forward their policies and not be endlessly judicially reviewed without much merit.

The use, or possible abuse, of judicial review is a genuine concern for Governments. There are bodies that say, "Judicial review is our weapon of choice. We do not like the way Governments do their work." Who funds those claims? One of the points that no one seems to have picked up from our report is that we think there needs to be some clarification about crowdfunding. We quote in paragraph 4.160 what, among other things, Dr Joe Tomlinson said: that there is a lack of "a proper ethical basis" and it "requires regulation".

The Government are also entitled to say that there have to be limits, but it is a balance. We think that the whole question of costs is something that probably needs separate consideration, although they are of course fundamental to litigation. We had very limited time and no evidence on this issue. Some suggestions were made by Sir Rupert Jackson, who is generally regarded as the costs guru among judges, which have not yet been taken forward. That is something that the rule committee could also consider. It is a balance that has to be struck, and it is not always an easy one.

The Chair: We now turn to the Human Rights Act, as you anticipated, Lord Faulks, with a question from Lord Dubs.

Q11 **Lord Dubs:** Well anticipated, Lord Faulks. Here is the question. The Government have established an independent panel, chaired by Sir Peter Gross, to review the operation of the Human Rights Act. In your report, you noted that "There is clearly a degree of overlap" between that review and yours. What are the overlaps between your review and the review of the Human Rights Act?

Lord Faulks: First, there is the overlap in the sense that quite a lot of judicial reviews are based either wholly or in part on alleged violations of the convention and thus of the Human Rights Act. There is also a question of principle, which I think the Government were concerned about: are judges making too much law? That perhaps lay at the heart of the setting up of the inquiry. We have discussed, even if not today, the Brexit litigation and the Miller cases, for example.

The Human Rights Act, because of the way it is drafted—involving the convention and the reference to the Strasbourg court—undoubtedly gives judges more power to make law. Since the Act came into force in 2000, there has been a significant accumulation of decisions by judges rather than by Parliament as to issues of human rights.

One of the questions that I understand Sir Peter's panel will consider is the extent to which the Human Rights Act may need revision because of the degree to which the courts of this country follow the decisions of the European Court of Human Rights in Strasbourg. In the early days of the Human Rights Act, the Supreme Court, or the House of Lords Appellate Committee, as it was, was inclined to say, "We must certainly follow the decisions of the Strasbourg court. In fact, if anything, we must go further. But we must certainly not go beneath that". That was in a case called Ullah.

Since then, there has been a slight rowing back, to say, "Yes, we can take them into account, but we don't have slavishly to follow the decisions of the Strasbourg court". The way Sections 2 and 3 of the Human Rights Act are framed may be revisited, as it were, to put in a bit more distance and to allow our own courts to develop human rights judgments and case law, not necessarily following Strasbourg but taking it into account in general terms, and clearly there may be decisions of relevance.

There are specific provisions which they may be considering, such as the extraterritorial application of the Human Rights Act in the context of armed conflict. This issue came up recently in Parliament on the overseas operations Bill. A number of claims were brought arising out of the wars in Afghanistan and Iraq. Quite a few of them, as the panel will know, were entirely misguided and brought forward by lawyers who abused the system.

The question was: should the European Convention on Human Rights have any application, first, to armed conflict and, secondly, outside the scope of the United Kingdom and outside the scope of European countries within the Council of Europe? Our courts said, in a case called Al-Skeini, that, no, they should not; that was not the intention. That is not to say that war should in any way be a law-free zone, but it does not have much to do with the European convention. The European Court of Human Rights decided differently in the Al-Skeini case, and our courts and the Government felt that they were obliged to follow that decision. I query whether that was the right decision and whether it was in fact one of the reasons why there was so much vexatious litigation.

So there are those matters. But I do not understand the suggestion that there should be any radical change in the Human Rights Act; we are not going to repeal it or be leaving the Council of Europe, and there will not be an amendment to the essential convention rights. So I very much doubt that there would be any deleterious effect on people's human rights. Of course, one waits to see what the Government actually do. They may of course take a different view from the panel chaired by Sir Peter Gross, or they may put a different interpretation on his conclusions.

Lord Dubs: Thank you. You may have already dealt with this question, but it is this. What important issues should the Human Rights Act review consider in relation to judicial review?

Lord Faulks: I do not think it will cover anything specifically. What it might do is this: by allowing the courts, as I indicated, to develop here their own version of human rights law as opposed to Strasbourg law, there may be a slightly different emphasis in certain areas, depending on what the courts decide. But nothing about the terms of reference suggests to me that there will be any substantial difference in the normal case where someone is relying on their human rights under the convention to bring a judicial review. They would have to be very specific if they were going to do that, and that would involve a major recasting, if not repeal, of the Human Rights Act, which I do not think is contemplated.

Chair: Thank you very much indeed. That concludes our evidence session. The next steps will be that we expect the Government to bring forward legislation. Your review and the report that you have issued will play a vital part in assisting all of us in considering that legislation, and it will be very helpful to us when we come to carry out our role of legislative scrutiny once the Bill is published. Thank you very much for appearing before us at this juncture. We are very grateful.