



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: [The implications for access to justice of the Government's proposed judicial review reforms](#), HC 868

Wednesday 18 December 2013

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Members present: Dr Hywel Francis (Chair); Baroness Berridge; Baroness Kennedy of the Shaws; Lord Lester of Herne Hill; Baroness Lister of Burtersett; Baroness O'Loan; Mr Robert Buckland; Mr Virendra Sharma

Questions 40-54

Witnesses: **Rt Hon Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, and **Rosemary Davies**, Legal Director, Ministry of Justice

Q40 Dr Hywel Francis: Good afternoon and welcome to this Joint Committee on Human Rights meeting, which is dealing with access to justice and the Government's proposals for reform of judicial review. Lord Chancellor, could you introduce yourself please for the record?

Chris Grayling: I am Chris Grayling. I am Lord Chancellor and Secretary of State for Justice. Rosemary Davies is alongside me and is my chief legal adviser. I apologise to the Committee that my department seems to have poached two of your members this afternoon. It is beyond my control, I am afraid, although I am delighted to have them both.

The Chair: We were just a moment ago informed that Lord Faulks and Mr Hughes have been appointed. We wish them well and I am sure that they will serve you and the Government well. Lord Chancellor, first, could we begin with judicial review and the rule of law? I should at the outset draw the Committee's attention to my entry in the Register of Lords' Interests. In our work on the lobbying Bill, we have been particularly concerned about the impact of the legislation on the ability of campaigning organisations, including NGOs, charities and faith groups to participate in the political process. In these proposals, the Government are seeking to restrict the ability of such campaigning organisations to access the courts and hold the Government to account to where they have acted unlawfully. We asked you for specific examples of abusive applications by such campaigning organisations but so far you have not given us any. We noted in your article on 6 September in the *Daily Mail* that you said that judicial review is being used as, in your words, "a promotional tool by countless

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left-wing campaigners”. Are you able to give us examples of abusive judicial reviews brought by such campaigning organisations purely for public purposes or delay? Do you have any examples of that?

Chris Grayling: Well, let me give you two or three examples, Mr Francis. In no particular order, I would first pick up, as an example of where a judicial review process was started in a way that in my view was much more about creating publicity than anything else, the Fawcett Society challenge to the 2010 Budget, on the grounds that the Chancellor had failed to consider the discriminatory impact that it had on women. A second example would be the—this is where delay comes in—the case brought against my department earlier this year by the Association of Personal Injury Lawyers, a challenge that was brought on a technicality to do with the consultation. We won the case but in my view it was a clear attempt to delay the impact of the changes introduced as a result of the Jackson reforms. I do not think that I would want to name a name because I do not think that it would be fair on the individual concerned. However, in my previous role at the Department for Work and Pensions, I had a conversation with a leading figure in the charitable world, when we were working quite closely together on a particular area of policy. The comment was: “You will probably get a letter from us in the next few days. It’s a bit legalistic. Don’t worry much about it. It is for other purposes”. I saw then and I have seen elsewhere—it was not the only example at the DWP—campaigning groups, which, to my mind, used judicial review as a vehicle to create a noise about a particular area, often off the back of applications for protective costs orders and often over technicalities rather than real issues of substance. On the delay front, I think one of the highest profile examples was in relation to Bristol airport, where the project there was delayed for many months as a result of judicial review. I want to be clear, Mr Francis, we are not seeking to abolish judicial review or to stop people going to court to challenge government decisions. But my frustration is I see cases being brought on a technicality—and the Association of Personal Injury Lawyers was a case in point—and it is clear that the motive is not to challenge a material wrong but actually to try to delay a process or create a platform in a way that I do not think that judicial review was designed to do. My view is that judicial review is there to give the people of this country when government takes a decision that materially affects them that it should not do. Increasingly, judicial review is about technicality. It is about things where a small mistake has been made. It is about an opportunity to delay a project. I do not think that that is what it is for.

Q41 The Chair: Is it a legitimate aim for the Government to seek to restrict its political opponents in the way that you are describing from accessing the courts to challenge the lawfulness of the Government’s actions?

Chris Grayling: I do not think that the law courts are an arena in which politics should be played out. It was interesting in the recent case on the spare room subsidy that the judge remarked that these were matters to be dealt with in the political arena, not the courts. It is my view that judicial review is a legal remedy for material wrongs that impact someone in this country. They are not a vehicle for political debate and I believe that they have often, not always, become a vehicle for political debate.

Lord Lester of Herne Hill: I understand, Lord Chancellor, exactly what you are saying but I do not understand why we cannot trust the judges in judicial review proceedings to make sure that permission is not given or that if frivolous cases are brought there will not be cost implications. My experience as a public lawyer is that we can trust our judges. I do not know whether you can give any examples, to take any of these three cases, of where judges were too lax in letting them through. Surely, it is the function of the judiciary and not the Executive, which is self-interested, to make sure that there is no abuse.

Chris Grayling: I think that I would make two points in relation to that, Lord Lester. The first is that each time one of these cases happens, it costs the public purse significant amounts of money. If it goes to court we are hiring counsel. Even if it is dismissed at the early stages, we still have to invest the time of lawyers to respond and provide detailed information to the court. That is money that could be being spent on prison officers, nurses or teachers, and I think that, at a time when public finances are tight, I want to see this process being used for genuine purposes. While I absolutely accept that there will always be cases that come to court that require a judicial decision and judicial wisdom, what judicial review should not be is an easy avenue for someone to make a point. I give you a specific example of a current case with which I have a very real issue. I take my role of Lord Chancellor very seriously, and I would never criticise a judge for a criminal decision that appeared to be too light or whatever. Every judge has the right and the responsibility to take decisions that they believe to be appropriate. The only time I bend that rule is if I am directly involved in a case, I disagree with the judge and I plan to appeal it. Let me take a very practical example at the moment, the judicial review of the case of the body of Richard III brought by the Plantagenet Society. The judge has decided that although I exercised my statutory powers appropriately, I should not have done because it is a matter of public interest. In my judgment that is not an appropriate use of the courts. If I have fulfilled my statutory obligations, I have fulfilled my statutory obligations. I am appealing that case as such on the principle of saying to the courts, “No, you cannot tell me that I am wrong when I exercised my statutory duty. That is my job”. That is an example in my view, and the reason why I am appealing, of where the judge’s view has been lax. But I do not think that it is a problem with the judges; it is a problem about process that sucks up huge amounts of public time, funded by you and I as taxpayers, funded by our fellow citizens as taxpayers, and I just feel that in a lot of these cases—not all, sometimes the Government get it badly wrong and sometimes judicial review is absolutely necessary—it is only there for that purpose.

Q42 Baroness Kennedy of The Shaws: The examples that you have given are all about small mistakes, technicalities, and people using it for political platforms. Those are all circumstances in which judges make decisions very speedily and indeed make cost orders against those who are using the system in that way. So, do you not understand, Secretary of State, that the concern is that you, the Government, as a party to this, are limiting the rights of the wronged citizen? That is what you are doing: you are actually limiting the right, and you are a party to the processes. That is why it really seems so invidious.

Chris Grayling: I completely disagree with that. What we are trying to do is avoid judicial review being used for trivialities and technicalities in a way that causes cost to the public purse. It is very unusual for judges to award costs. Very often in a lot of these cases,

protective cost orders are in place and we are looking to tighten the criteria for the issuing of protective cost orders because if an organisation really wants to challenge the government on something that is not related to the material wrong of an individual, I do not think, some of the time at least, it should be able to do so without concern that there will be a financial consequence of pushing it and getting it wrong. What we are not doing is saying that there will be no role for judicial review; what we are not doing is saying that it will not be possible to bring judicial reviews; what we are not saying is that it will not be possible for campaign groups to bring judicial reviews. We are saying that it should not be an easy and simple process to bring a judicial review on a technicality or triviality, or with a goal of delaying something, where the taxpayer ends up being the one who is losing out.

Q43 Baroness Berridge: Do you accept that, if implemented, your proposed changes to judicial review will have an impact on human rights cases? If you do, how do you intend to mitigate that impact?

Chris Grayling: I do not think that it will have an impact on human rights cases because where there is a genuine case, a genuine point of law that needs to be addressed, a genuine human rights case that needs to be address, of course, the funding will still be there. The legal aid funding will still be there if it is needed. The route to court will still be there. But it is also the case that a lot of the human rights issues exist not in relation to the kind of general governmental judicial reviews but actually, very often, in relation to judicial review case. I simply refer you not to things that I have said but to what some of the judges have said. In the autumn last year, in a particular case that was brought, it was argued that someone who was here and had not the right to be here would breach his rights under Article 8. The judge said, “This is an incredible case. This is a case where the claimant has not been removed once or twice. This is the third time. What on earth is going on? Why should the court waste any more public money? This case is so utterly without merit that no further public money should be wasted in dealing with it”. Now that is not a unique comment in the courts. Human rights cases are sometime brought—I talked about delay—very intentionally to try and delay a deportation procedure. I just want a system that is fair, both to the individuals and to the taxpayer, and I do not want us to be making a decision where we are having to cut jobs in the Prison Service, for example, in order to make sure that there is resource available to pay for cases that are, frankly, not ones that we should be having to face up to. The cost to us happens anyway—it is the cost and time of Rosemary and her team; we have to have a bigger team of lawyers to deal with the amount of cases we get, and the Department for Work and Pensions is the same. What we are looking to do in this package is to restore a degree of common sense to the system I think.

Q44 Lord Lester of Herne Hill: Lord Chancellor, 145 Treasury counsel—these are not claimants lawyers; these are lawyers acting for the Crown, for the Government—wrote to the Attorney-General and copied you in. They said that the proposals regarding legal aid and judicial review, “will undermine the accountability of public bodies to the detriment of society as a whole and the vulnerable in particular”. As I say, these are experienced barristers who represent you in judicial review proceedings. Do you think that they are wrong? And if so, why to you think that they are wrong?

Chris Grayling: It would be unfair and improper for me to single them out and comment on them specifically. These are the guys doing the work itself. I think we have achieved a sensible balance. We talk about public bodies being accountable. Public bodies should normally be accountable in the democratic process, and the courts should come into play only if a public body has behaved in a way that will materially affect an individual or organisation in our society in a way that is not consistent with the law. Judicial review and the courts should not be there to have the kind of arguments that took place over the spare room subsidy, where the judge was very clear in saying that this is a matter that should be dealt with in the democratic process and not in the courts. All I am seeking to do is ensure that what should be dealt with in the courts is dealt with in the courts and what should be dealt with in the democratic process is dealt with in the democratic process.

Lord Lester of Herne Hill: What puzzles me about your answer is that you are a politician, you are forming a political view and you are accountable to Parliament. But we are talking about the role of the courts and barristers representing the Crown. I am not clear why it is appropriate not to allow their evidence as practitioners as extremely important. The example that you give of the judge shows that the judge is perfectly well able to deal with abuses. I just do not understand why you feel so confident that you can, as it were, put forward a political view at odds with the evidence.

Chris Grayling: The evidence in what you are saying is that the people who currently do the work are raising concerns that we will not do as much of it.

Lord Lester of Herne Hill: Doing the work for Government.

Chris Grayling: That is undoubtedly true, because we have to defend a significant number of cases at the moment. What I am saying, Lord Lester, is not that we expect to defend no cases in future but that we would rather like to defend fewer cases and to have a system that brings cases on genuine merit, not on technicalities.

I and my colleagues in government have over the past three and a half years seen numerous cases where judicial review is brought based on a flaw in a consultation process, where it has been obvious that, in the end, the decision would be exactly the same. You know, you are dealing with a budgetary challenge, you set out a policy to deal with that policy challenge, somebody makes a not particularly massive mistake in the technicalities of the consultation process, we end up being judicially reviewed, the savings are delayed by three or six months because of the court process and we then have to save money elsewhere because we have not been able to implement the policy. That has not materially changed anything; it has just delayed it; it is not a decision that we would have taken differently. It is because somebody has found that somebody has crossed a 't' or dotted an 'i' in the wrong way. That is where I have the issue.

We were quite careful in looking through the approach on legal aid. We had a bit of a discussion about at what point we should start paying legal aid. My view instinctively is that the legal profession should do a bit more at risk if it is confident in its case, but I accepted absolutely the logic that that first letter from the person who has run into problems with the local authority in a housing matter, for example, written by a lawyer saying, "You have done this person wrong", should be legally aided because, actually, we

have genuine issues where a local authority gets a housing decision wrong and someone ends up being materially disadvantaged. It is right and proper that the state should help them to take that concern to the local authority. It is the technicalities, the delaying tactics, that I want to ensure that we avoid in the interests of the country, because delaying major infrastructure projects that are needed for our economic future is not good. At the same time, I want us to ensure that cases are genuine and raise real concern, not just trying to put a block in the system.

Q45 Baroness Berridge: You talked about being fair to the taxpayer and that we are in a time when public funds are not limitless. The Government or a local authority defend in these proceedings. On a couple of occasions, once in evidence on this issue and once in another context, lawyers who sometimes represent both the claimant and government have talked about the differing tests there are if you are working through the public purse but for government. Is there a tightening up going on across government so that cases that should not be defended are not defended and that lawyers face the same restrictions on having to satisfy merits when they are working for the Government or the local authority as they do when they are working for the claimant?

Chris Grayling: I think we have to be very careful. I do not think that we should defend cases gratuitously. I have talked about the Richard III case. A few people have said to me, “Why are you defending that case?”. The reason is clearly in part to do with the agreement that we had with the University of Leicester, but it is particularly because of the ruling of the judge, which I think needs to be addressed in a further proceeding, when he said that although I had exercised my statutory duty entirely consistently with what the law says, actually I should not have done so in that situation. That is quite a dangerous precedent to create: a Minister being told that they should not exercise their statutory duty because there is another public consideration. That is where I would see a need to defend a case.

If we get something wrong and we have materially disadvantaged someone, it is better to own up to it and sort it out than gratuitously to defend it in the courts without seeing any evidence.

The Chair: We need to make progress and I ask the Lord Chancellor and colleagues to be a little more succinct.

Baroness Lister of Burtersett: Lord Chancellor, on a couple of occasions, you referred to DWP cases as somewhere where you think judicial review is being abused. I declare an interest as the honorary president of the Child Poverty Action Group and I worked for the organisation in the 1970s and 1980s. During that period the group developed what it called a test case strategy which, in giving evidence to us, Sir Stephen Sedley, commended for helping to clarify what, as you know, is often very complex social security law. Do you not accept that that is a valid use of judicial review?

Chris Grayling: In straitened financial times, no, I do not. When we are taking tough decisions that are materially affecting people in different parts of government, spending large amounts of money testing issues in the courts rather than sitting down, having a grown-up discussion with those involved in trying to reach a resolution about what is right and what is wrong is a much better way of doing things.

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Q46 Baroness Kennedy of The Shaws: I have two matters. I just want to clarify something, because I think the legal profession will be very interested to hear what you are saying. When you were answering Lord Lester and he was suggesting to you that a large number of lawyers who act for the Government are expressing concern about what you are doing to judicial review, you said, almost, “Well, they would, wouldn't they?”.

Chris Grayling: Not you personally but some of those people are saying the same in return to me: “I would, wouldn't I?”. The truth is that everyone has a particular perspective on this.

Baroness Kennedy of The Shaws: Yes, but you are also suggesting that it was going to reduce the amount of work for them, therefore they are approaching this as a vested interest in looking after their monetary interest. Is that really your belief?

Chris Grayling: No. The point I am making is that inevitably those who think that the Government are acting to try to reduce the number of times we have to deal with legal pressures believe that we are doing so because we want less grief in the courts. I would say equally that those who work in the courts or belong to the law will inevitably see the law as a good way to resolve issues. I suspect the truth is somewhere between the two, and I hope that the proposals we have put together are indeed somewhere between the two. I think there is a sensible balance between making sure that people get access to the courts while we weed out some of the trivialities.

Baroness Kennedy of The Shaws: I am sure that the legal profession will scrutinise the way that you answered Lord Lester's question to see exactly your position.

I want to ask you about Sir Stephen Sedley. He told us that, in his view, the two roles of Secretary of State for Justice and Lord Chancellor were not compatible. You know from our last meeting that that is a view that I share. In his view, your proposals for the reform of judicial review are in large part proposals that an independent Lord Chancellor would have stood up against and that you have failed to do that because you have failed to take sufficiently seriously the role that you have as Lord Chancellor and you do not give that role priority. Do you have any comment to make?

Chris Grayling: I think that that is not right. I do not believe that that is the duty of the Lord Chancellor. It is the duty of the Lord Chancellor to uphold the independence of the judiciary, to ensure that we take all steps we need to to ensure that we have the proper rule of law in this country. I do not believe that it is the responsibility of the Lord Chancellor to stand up and argue that all people should be given access to the courts in all circumstances to bring anything that they might want before the courts. At a time when the nation's finances are straitened, it is the job of the Lord Chancellor to try to ensure that budgetary and policy decisions are taken which find the right balance. I see it as my duty to ensure that reform happens in a way that I do not believe will damage the interests of justice. I have not seen evidence in this matter that convinces me that stopping a pressure group delaying a national infrastructure project because there was a technical flaw in the consultation is undermining the rule of law.

Q47 Baroness O'Loan: You have asserted that the use of judicial review has expanded massively in recent years. Do you accept that, while the number of immigration and asylum cases has increased, the number of civil judicial reviews has remained fairly constant for the past 15 years, at around 2,000 a year?

Chris Grayling: The first thing to say, as the Committee will be aware, and I apologise on behalf of the department for it, there was a mistake in the documentation, which showed a higher increase in the number of immigration-related cases and a lower increase in the number of non-immigration related cases. However, there has still been an increase over the past decade of about 20% in the number of non-immigration cases as well. When judicial review in its current form began in the mid-1970s, there were a few hundred cases overall a year. The number is now in excess of 11,000, so I think on any measure this is an area of legal activity that has grown over the years.

Baroness O'Loan: You say, Lord Chancellor, that the figure rose by 20%, but the figures that we have are that it rose from about 1,800 to 2,100—is that 21%?

Chris Grayling: The number of civil judicial reviews lodged between 2000 and 2012 rose by 21% over the period. It rose from about 1,800 to 2,100.

Baroness O'Loan: I just want to query the figure of 21%, Lord Chancellor. It is not 21%.

Chris Grayling: It is around that. I will supply the exact numbers. The numbers are about 1,800 and about 2,100, but I will happily supply the committee with the exact figures.

Baroness O'Loan: But it might be that in 12 years it has gone up by 16% rather than 21%, which would be important.

Chris Grayling: The numbers are magically appearing from behind me. In 2000, it was 1,752 and in 2012 it was 2,118.

Lord Lester of Herne Hill: Have you related that to abuses of power in the same period? It may well be that there has been increased misuse of public powers.

Chris Grayling: As I said earlier, Lord Lester, my intention is not to prevent judicial review in cases of misuse or abuse of public power. I have been referring to cases where challenges have been brought on procedural technicalities that would have made no material difference to the eventual decision, where they have had the effect of delaying infrastructure projects without any realistic chance of demonstrating at the end that the decision to build the infrastructure project was wrong.

I am absolutely not, in any way whatever, opposed to judicial review being used for genuine abuses of public power. My concern is that it is being used for purposes apart from that. Judicial review is absolutely for that.

Baroness Lister of Burtersett: On the question of delays in infrastructure projects, Lord Chancellor, in your answer to our written questions, the examples you give of where they were unjustified were all raised by the consultation responses themselves. What specific

examples did the Government have in mind when they launched their consultation paper before receiving those responses?

Chris Grayling: I could give a number of examples. We talked about Bristol Airport. Southend Airport had a similar situation in 2010. There was a similar issue about the Surrey Quays shopping centre in 2012, a major development in Skelton. We could provide a long list; those are just a handful of examples. Judicial review has clearly been used on occasions as a vehicle to try to delay a project.

Rosemary Davies: There is an example in the consultation paper at page 6—at least one, there are probably more; we can provide more.

Q48 Baroness O'Loan: Lord Chancellor, you have told us that the reason why the data on the reasons why judicial review applications are withdrawn before a permission decision is made are not recorded, but in the absence of such information, what do permission rates tell us about the scale of abuse of judicial review?

Chris Grayling: This is one where it is very hard to give you exact statistics, because statistics do not conform to a statistical norm. What we have provided for you, and what I will illustrate today, is that if you call any Minister from virtually any government department before you, you will get a similar message about cases that are being brought for matters that are not material. Very frequently, the argument is that the Minister should reconsider a decision because part of the process has not been entirely right—even though there is no serious thought at all that the decision would be any different. We as a Government are paying—the taxpayers are paying—tens of thousands of pounds in legal costs to deal with those situations.

What we are trying to do is say that there are some sensible hurdles over which you should jump before you bring a judicial review case. The example I will use that is related most directly to this is that I do not believe that a judicial review should be given a full hearing—certainly on a procedural matter—unless there is a reasonable likelihood that amending the procedural error would create a different decision. If all we are doing is having an argument which says, “Right, you’ve taken the wrong decision here, you’ve gone through the wrong process and not handled exactly the processes you said you would, so you’ve got to go back and do it all over again”, that is a complete waste of public money that will lead to exactly the same position.

Baroness O'Loan: I’d like to follow this up, but I shall leave it to Mr Buckland.

Q49 Mr Buckland: Lord Chancellor, I would like to ask about the reform of standing: that is, the connection that somebody or an organisation has to an application. I note that in response to our question, the Government said that their view of the current law on sufficient interest was that it still means that a public interest challenge would be accepted generally. The evidence we have heard strongly suggests that the courts already rigorously apply the test requirement to show that a party has to demonstrate that they have a sufficient connection with the subject matter of the challenge to make them an appropriate party to bring the claim. Do you think that that evidence is wrong?

Chris Grayling: Not necessarily. In the particular case of standing, you will have seen from the consultation document that we asked a reasonably open question about this—and there have been cases. There was the case of the peace campaigner who challenged the Ministry of Defence over its handling of insurgent detainees. They had no direct interest in the case, but it was brought in the public interest and funded by the Legal Aid Agency, so we all picked up the bill for that. Clearly, the person in that case had no actual standing in the case. We have simply served to raise the question. You are absolutely right, Mr Buckland, that that is the situation at the moment. We have asked a more general question: namely, do we have enough protection to prevent organisations or individuals with no real connection to a situation from pursuing a case for campaigning or other purposes? We have not finished our work on the consultation responses yet, so I cannot share with you our eventual position. However, I will say that it was meant to be a pretty open question that asked: do you think that there is more that could be done, or is the current law satisfactory?

Mr Buckland: Or was that perhaps a case where the court just took the view that there was a strong public interest that overrode the connection?

Chris Grayling: Indeed, that may be the case. However, the case is then funded by the Legal Aid Agency—funded by all of us. I am not saying that that case is necessarily inappropriate. I am just highlighting it as an example of a case that was brought—and, indeed, dismissed—where there was really no connection at all between the person bringing the case and the subject of the case. There will always be cases where the court judges that a matter is of sufficient public interest for it to be considered, and it is important in law that that should be the case. We are simply asking the question: have we got the right balance in the issue of standing? Is the current arrangement satisfactory or are there further things that we could or should do to ensure that those who are participating in a case have good reason to do so?

Q50 Lord Lester of Herne Hill: I wonder whether you have been advised about the very substantial disincentives that exist now in the system against irresponsible judicial review. I have in mind two. One is that you have to bear the costs of the other side if you lose, unless the judge decides otherwise. That is a very powerful disincentive, unless there is a protective costs order. The second example, as I am sure your admirable legal adviser will confirm, is that judges do now allow judicial review if you have not had recourse to alternative effective remedies first. For example, if you have not done the sensible thing—which you quite rightly pointed out—of sitting down and discussing the case with someone who will give a remedy, the court will take that into account and not allow any relief. The same is true if it is a purely abstract case on a legal technicality that will not really change anything on the ground. That is why we have such confidence in our judges, who invented judicial review in 1975 and have made it work properly. I am not saying that it is perfect, but I am aware of the disincentives that make it very hard for people to bring judicial review proceedings now.

Chris Grayling: Let me give you a couple of responses to that, Lord Lester. The first is in terms of the financial risk. Of course, what typically happens today, in an increasing number of cases—I have seen it very regularly over my three and a half years in government—is that a campaigning group will shelter behind an individual, normally an

individual with limited means so that there is no realistic chance, even if the case is not successful, of costs being awarded against them. That organisation will provide the legal input into the case. However, if the Government win the case, we have absolutely no opportunity to get our costs back, because the person we are trying to get the costs back from is the individual of limited means, and the court will never award punitive costs against them—or costs against them to any significant degree. I think that that is wrong. One of the * 15.06.34 Alan Spar ? * proposals would give the courts greater power to make those organisations that shelter behind an individual pay towards the costs of the case if they lose. That seems to me to be entirely reasonable and sensible, but it does not happen under the current system.

Baroness Berridge: In terms of standing, and the move to direct and tangible interest, it seems from your answer to the question before last that you are not suggesting that the court should turn away cases where there is a strong public interest in determining whether the Government acted unlawfully, even when there is nobody with a direct interest to bring the claim. The classic case is something like the Rose Theatre case, where you had the artificiality of famous actors joining the case. You seem not to be saying that there will be circumstances where the courts can still allow a claimant to bring a claim, even when there is no direct and tangible interest in the subject matter. Is that right?

Chris Grayling: In a sense, I am not even going that far. The point of the consultation about standing is genuinely that this is not an area where we have brought forward very detailed and specific proposals. We are genuinely asking: what do you think? I would not want to have a situation where genuine cases of public interest could never be brought. At the same time, it is the case, for example during the time we were involved in Iraq, that there were law firms in this country looking around Iraq, trying to find people for whom they could bring a case in the UK courts—and I am not sure that that is appropriate.

Q51 Baroness Kennedy of The Shaws: You suggested that the Legal Aid Agency should retain a discretion to make payments in meritorious cases. We are at least relieved about that. Does that address the problem that any decision that the LAA makes will be after the event? The problem is that it will not assist providers earlier in the proceedings when they are making decisions on whether or not to proceed.

Chris Grayling: To explain the reason we have gone down the road that we have on this one, Baroness Kennedy, I will go back to the housing example. The lawyer has been paid to write a stropmy letter to the local authority over a housing issue and the local authority has said, “Go away”. The lawyer believes that there is a strong case to bring, and brings it. In many other areas of the law, legal firms act on a no-win no-fee basis. If that lawyer believes that there is a strong case, I cannot see a good reason why they should not bring it in that situation. If they then launch the proceedings and at that point the local authority says, “Fine, it’s a fair cop, we concede”, I think it should be the local authority that pays the bill of the lawyer, not the Legal Aid Agency. All the focus of the lawyer should be to recover costs from the public body that has behaved badly. Obviously that will be from the local authority budget, not from mine. Of course, if there is a case, I do not want a situation where the lawyer brings a case successfully, where there is very good reason why the public body cannot or will not pay the bill and where the lawyer therefore goes without

their fee. What we have done is left a position that says, “There will be funding available if you really can’t get the money back from the body you have just successfully sued, but you’ll have to demonstrate to us that you really can’t get that money back”—because otherwise it should be the local authority and not the Legal Aid Agency that picks up the bill. That is no different from any case where the person who has got things wrong normally pays the costs.

Baroness Kennedy of The Shaws: You do appreciate that the firms of solicitors doing this work have no fat in their system. They are really not making lots of money. So it is very hard for them to take on cases of this kind, doing public interest work, on the basis that, “Well, you know, we think it’s a winner”.

Chris Grayling: It is not obvious to me why it should be possible to bring a no-win no-fee case for a few thousand pounds in relation to a motor accident and not to bring a no-win no-fee case for a housing problem.

Baroness Kennedy of The Shaws: That is a longer discussion, and perhaps today is not the day for it.

Q52 Baroness O’Loan: The proposals on standing seek to introduce a need for an applicant to have a direct interest. The protective costs order proposals would remove the use of such orders where there is a private interest. Do you accept that that would create a Catch-22 where an applicant could never meet the tests?

Chris Grayling: I am frankly concerned that protective costs orders are too widely used. I go back to the Richard III case. An organisation called the Plantagenet Alliance claims to represent the descendants of King Richard III, of whom I suspect there are quite a lot in this room already, and is doing so with a protective costs order. I am not clear who backs the organisation and what its real standing is in the case, but a protective cost order has been granted, which means that the case can be brought knowing for certain that we will pick up most of the bill. While I am absolutely of the view that if a public body gets it badly wrong, it should be held to account, should pay damages and should pay costs, I struggle with the fact that it always seems to be the public purse that picks up the tab, win or lose. So what we are looking to do is provide a bit more balance in the system that says, “Look, if you do sue the Government and lose, there is a much greater likelihood that you will have to pay the costs”. There are lot of pretty well-off campaign groups out there that bring cases in the safe knowledge that they might have to pay only £10,000 or £20,000 in legal costs with a protective costs order. I do not think that that should always be the case.

Lord Lester of Herne Hill: Perhaps I ought to say that I did the case that developed the protective costs order: the Corner House case. The Corner House was an absolutely tiny NGO, challenging the previous Government on abuse of power. I assure you that the only way in which those proceedings could have been brought was because the Court of Appeal recognised that the Corner House should not have to pay the Government’s costs even if it lost. It was a major issue, so you would be mistaken if you thought that the idea of a protective costs order, which comes entirely from the judges, is a bad one.

Chris Grayling: I do not disagree with you on that. It is just that it seems to have become the norm rather than the exception. I would not want us to be in a position where the little guy could never sue the big guy on a matter of public interest. It does seem to have become the norm that well-off campaign groups seem to expect to get a protective costs order, come what may. I am trying to put a bit of balance back in the system, not to abolish protective costs orders.

Lord Lester of Herne Hill: I am grateful for that answer. I am not suggesting in my question that judicial review at present is perfect. I wonder to what extent you are thinking about other ways of solving some of the problems. For example, the Bingham Centre for the Rule of Law has asked one of the leading public lawyers, Mike Fordham QC, to look at ways of speeding up judicial review, instead of restricting those who bring judicial review. Would you be sympathetic to that? I am not saying that it would not do away with some restrictions on judicial review, but would it not be sensible to look at improvements to speed up the process?

Chris Grayling: I am absolutely entirely in favour of that. I would still say, though, that even a faster judicial review process takes up resource within government, and therefore I am still keen to ensure that those cases that are brought and make progress are ones where there is a genuine issue. So I come back to the question of process. The case brought by the Association of Personal Injury Lawyers was based on the premise that we appeared to have promised an extra dimension to consultation that did not happen, if I remember rightly—that was essentially it, was it not?

Rosemary Davies: Yes; it was a failure to consult on the principle of reducing a fee before we consulted on the fee reduction. So we consulted on the fee reduction, but the JR was on the basis that we had not had a preliminary consultation on whether to reduce it or not.

Chris Grayling: That case proceeded pretty rapidly, but it actually put into jeopardy a process of change that was locked into the timetables and that was going to deliver financial benefits for consumers. I regarded it entirely as a delaying tactic. I am entirely sympathetic to ideas—people come to our department with ideas for speeding up judicial review, and we are entirely open to them and look very seriously at them.

Q53 Lord Lester of Herne Hill: But do you not see, Lord Chancellor, that it is very hard for you to generalise? For example, the Corner House case was all about the failure by the previous Government to have a proper consultation when they were doing a deal with fat cats about rather unsavoury matters. That was entirely about process and about consultation, but it disclosed an abuse. It is not really for a Minister to second guess these things. It is for the courts to see whether there is anything in it or not—and, if there is not, to control it properly.

Chris Grayling: I do not think that we are taking away that power from the courts. I would not sit in front of this Committee as Lord Chancellor and argue that we should abolish judicial review—that would be wholly wrong. Equally, it is not wholly wrong for me to argue for what I think will improve the process and the rule of law and will ensure that this is used for the purpose for which it was intended to be used. I do not think that any of the changes materially impact upon genuine important public interest cases and genuine important cases where people have been wronged by public bodies. What I think they do is tighten the system so it cannot be used for less substantial purposes.

Q54 Baroness Lister of Burtersett: I think that this is our last question on judicial review, Lord Chancellor, and it refers specifically to the public sector equality duty. Do you believe that the enforcement of the duty is one of those issues that ought not to be a matter for the court? In regard to that, will you comment on the evidence that we received from Mr Hayward, who has reviewed the duty? He believes that there is a role to play for judicial review in the enforcement of the public sector equality duty.

Chris Grayling: I should say that this question in our consultation was very much requested by our colleagues in the Government Equalities Office in DCMS, so it is not my own area of responsibility. But I would say that while we take equality issues very seriously, the requirements around the public sector equality duty often actually require you to do work in areas where you might be able to write an equality narrative but where in fact it applies to everyone, regardless of race, colour, creed, sex and the rest. So I think that we recognise the importance of the equality duty. What we want—again, my colleagues are looking at this—are ways of ensuring that it is tested only when there is a genuine issue, and that it does not become an excuse in other areas.

Baroness Lister of Burtersett: Going back to the very beginning of your evidence, you used the Fawcett Society's judicial review on the equality duty as an example of a sort of unmeritorious case. I should say that I am an ordinary member of the Fawcett Society. My understanding was that yes, obviously we are not unhappy to get publicity, but that was a genuine attempt to try to get the Government to take seriously their duty to provide equality impact assessments. What was being provided simply did not cut the mustard.

Chris Grayling: Of course, in legislation we do not have an obligation to provide equality impact assessments. Our duty is to understand the equality impact. A good example of the kind of dilemma you get would be from when I was Employment Minister and overseeing Jobcentre Plus. We had to make job reductions in Jobcentre Plus, and inevitably those job reductions disproportionately affected part-time women. The workforce was disproportionally balanced—not inappropriately so, but there was a larger proportion of part-time women in the workforce than there would have been elsewhere. So it was actually impossible to close jobcentres without having a disproportionate effect on part-time women. We needed to understand that that impact was there and consider whether there was any way around it, but the reality was that if you have a workforce that is predominantly composed of women and you have to reduce it, unless you act in a way in which you actively discriminate against the men to balance the numbers, a greater proportion of women will inevitably be affected in a situation like that. Our job is to consider that fully, make sure that we understand the implications and are able to answer questions on them. However, I think the purpose of the question from my colleagues is to understand what the views are about the way in which the equality duty is used and how we make sure that it is applied with common sense.

Baroness Lister of Burtersett: I absolutely take that point, and you were right to correct me that the duty is not to provide the impact assessment. But the point was that it was not apparent to organisations such as Fawcett and others that the duty to take account of the equality impact was being adequately fulfilled.

The Chair: Lord Lester wishes to ask a very short question to end this session.

Lord Lester of Herne Hill: I quite understand the need to slim down the public sector equality duty as it is put into practice, to avoid unnecessary red tape—I quite understand that. However, the reason that judicial review is there is because it was decided that it was inappropriate to make it a legally enforceable duty other than by judicial review, which is a much more moderate and proportionate remedy. I think that you are not saying that you are against using judicial review in cases where public authorities simply disregard their public sector equality duty. You are not saying that, I think.

Chris Grayling: The purpose of the question really was to raise a discussion. This is something, as I said, that is not within my own department's area of responsibility, but we used the consultation document as an opportunity to raise the question. As I think that in an area such as this, which has been in place for three years now, we should say, "Is this working right, and are there other things that we should think of?"