



Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 16 November 2016

10.20 am

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Brennan; Baroness Dean of Thornton-le-Fylde; Lord Hunt of Wirral; Lord Judge; Lord MacLennan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Evidence Session No. 3

Heard in Public

Questions 29 - 48

Witnesses

[I](#): Emran Mian, Social Market Foundation; Chris Walker, Independent Housing Consultant.

[II](#): Alison Harvey, Immigration Law Practitioners' Association; Peter Jorro, Barrister, Garden Court Chambers.

[III](#): Sir Ernest Ryder, Senior President of Tribunals; Judge Michael Clements, President of the First-tier Tribunal, Immigration and Asylum Chamber; Judge Julian Phillips, Resident Judge of the First-tier Tribunal, Immigration and Asylum Chamber.



Examination of witnesses

Emran Mian and Chris Walker.

Q29 The Chairman: Welcome to Mr Emran Mian of the Social Market Foundation and Mr Chris Walker, who has just left the Policy Exchange and is now working in his own housing business. We are grateful to you both for coming. I have explained to you both that we are under pressure on time and I apologise for that. We shall try to make our questions concise. I will start with one about the use of evidence, which is something that resonates throughout our inquiry on the law-making process. What are the constraints that prevent government departments from proposing evidence-based policy? Is it lack of in-house capacity or some other factor?

Emran Mian: The primary reason why the Government are not always as effective as they should be is a mismatch between the timeframes needed to do rigorous, robust research and the timeframes that we usually allow for policy-making. On the occasions when those timetables can be aligned, we make effective use of policy-making in government. To give an example from my own experience, I was the civil servant responsible for the independent review of higher education funding. Because we knew three years in advance that that review was to take place, because there was a commitment made in the course of the legislation to increase tuition fees, we had three years to plan for putting the evidence base in place. We were able to commission academics to do work that would contribute to the review. That was an occasion when we were able to align the timescale needed to do robust research with the policy-making timescale. That is often not the case because policy-making is often done in a much more abbreviated timescale.

The second reason that sometimes inhibits us is not a skills issue; it is a capacity issue. Often the skillsets that we have in government in the analytical services—economic and social-research—are very well deployed in response to events or things that Ministers or senior officials are interested in, but what those people lack is the time to do curiosity-based research. For example, I used to work in the business department as the director of strategy. I found that our labour market economists were very effective in responding to our requests and to Ministers' requests, but did not have the time or the bandwidth to look themselves at what was going on in the labour market and propose issues that we should be thinking about on the policy side. That is a capacity issue rather than a skills issue. There simply was not enough capacity, enough people, to do curiosity-based research.

Chris Walker: I have worked across three or four different government departments in my lifetime inside the Government Economic Service. Generally, I found that the use of evidence in policy-making was, on the whole, pretty decent across the departments I worked in. I was the lead



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analyst on the right to buy reinvigoration policy a few years ago. We used extensive econometric modelling to forecast right-to-buy sales under the different options. We also did some pretty extensive value-for-money analysis to look at the value to the public purse. Generally, that was quite a good example of where the evidence was really brought to bear. I can safely say that the results coming from that analysis had a bearing on the final policy options that were selected.

There is always tension, which Emran alluded to, between political timescales and the timescales that ideally you would have to do evidence in policy-making. Inevitably, there is tension ultimately between democracy on the one hand and technocracy on the other. For example, the Treasury's Green Book talks about the ROAMEF cycle, which is an ideal way of applying an evidence base to policy-making. To do that and adhere to it properly takes a lot of time, so, particularly if you are under a lot of pressure, strict adherence to the ROAMEF cycle can very quickly go out of the window.

The Chairman: On the timescale point, do you have a solution in mind? There is obviously a difficulty with an incoming Government with a manifesto to deliver, who want all the Bills fairly early on and therefore they are perhaps not properly considered early enough. Do you have a way of sorting that problem?

Emran Mian: There are some quite simple things that civil servants can do to help Ministers to be more responsive to evidence. For example, civil servants regularly do horizon-scanning on behalf of Ministers. We do it when there is a change of government, but we also do it at other points in the cycle. Often that horizon-scanning is done purely by policy civil servants. What we usually fail to do is to engage with academics who might be thinking about the same fields. We fail to engage with researchers who might be trying to project forward trends that we might be able to foresee. We are very bad at involving outside expertise in that kind of horizon-scanning.

There are examples. The Government Office for Science does a set of foresight reports that are precisely that kind of horizon-scanning. They are often done on a very long-term basis. There was one on the future of manufacturing, looking 50 years from now, a superb piece of work involving lots of serious researchers. That is the kind of thing that we should not leave to just the Government Office for Science to do. Something that more policy civil servants should regard as part of their day job is helping Ministers to do that kind of forward-thinking.

Another thing that policy civil servants often fail to do is related to my first point. We underestimate how keen experts and academics are to engage in a policy conversation. A switch turned for me at some point when I realised, as a senior civil servant, that if I called or wrote to academics and invited them to come in and talk to us about their work, they would come. There was no barrier. The barrier was an imagined one from our side, and to some extent imagined on the other side as well.



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Senior academics in particular probably underestimate the extent to which they can just ring us up and we would be interested in having a conversation. Equally, I think senior civil servants often lack the nous to do that. We should just pretend that there is no barrier whatsoever and ring people up and speak to them much more often.

Q30 Lord MacGregor of Pulham Market: Following on from some of the comments you have made, is there a tension between political commitments to legislation—for example, from the manifesto or in response to public or political pressure—and adherence to evidence-based policy-making?

Chris Walker: Inevitably there is tension, yes. To give an example, a certain party might have a particular election manifesto; that party subsequently gets elected to government and discovers that actually the commitment in the manifesto does not have the evidence-based credentials that it wanted. As the Civil Service scrutinises it and draws up the evidence, it can often point in exactly the opposite direction. That is an example of where there can be tension and where, inevitably, there can be a degree of retrofitting so that, rather than evidence-based policy, there is policy-based evidence.

At the end of the day, it is that tension between having an elected Government and a technocratic arrangement. At the end of the day, you cannot just have adherence to an economic model that says yes or no; you have to take the other considerations into account. One of the key roles of evidence in policy-making is to get the best possible outcome for Ministers and the Government, subject to the political constraints and the realpolitik.

Emran Mian: I depart slightly from Chris's view. I completely understand that there will be cases when Ministers choose not to follow where the balance of evidence might be. What is inexcusable is when the Civil Service fails to inform Ministers about where the balance of evidence is, and that happens all too often. All too often, a political decision is allowed to take place without Ministers even knowing what the evidence base is, and that does not feel right to me. It is the Civil Service's obligation to ensure that, when Ministers are making that decision, they are doing it at least with sight of all available evidence. I am not sure that we always have the mechanisms in place to make sure that that is happening.

Lord MacGregor of Pulham Market: Would you go so far as to say that evidence, or a lack thereof, should block the fulfilment of political commitments? That may be idealistic, but is it realistic in practice?

Chris Walker: I do not think that should be the case, no. Ultimately, it is for Ministers to decide whether a policy is enacted or not. The role of the Civil Service is to help the Minister make that decision in the most informed way possible and to highlight the best possible policy options to deliver their mandate, which again should be underpinned by an evidence basis. In short, the answer to your question is that ultimately Ministers



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must decide, but it should be done in an open and transparent way. For example, we have the ministerial direction. If a Minister goes against the evidence, the department can issue a direction to say that that is what happened. As long as it is done openly and transparently, and the Minister is accountable for his decision, the decision should absolutely rest with him.

Emran Mian: That feels key to me. We must have the transparency mechanisms by which, if a political decision is being made that is contrary to the balance of evidence, it is transparent. We have a number of mechanisms to help that be the case. We have ministerial directions, which are used if a ministerial decision does not prove value for money; the Permanent Secretary writes to the Secretary of State asking for a direction and the Secretary of State replies. That makes transparent where the balance of evidence lies. Equally, we have equality impact assessments and regulatory impact assessments that often serve the same function of making it clear where the balance of evidence might be.

Lord Judge: Could you give me a couple of short examples of occasions when the Civil Service failed to provide Ministers with evidence? That was the criticism that I understood you to make. I would like you to give us a little more detail, please.

Emran Mian: One example is when I was director of strategy at the business department in 2011-12 and we were thinking about what the foundations of a government industrial strategy should be—again, a live policy issue at the moment. In that role, one of the things I felt that we were unable to do as effectively as we should have was to provide Ministers with an evidence base for the success or otherwise of previous attempts to do industrial policy. In that case we had a Secretary of State, Vince Cable, who himself was an economist and understood quite well some of the evidence that was there. We often found ourselves in the position, as civil servants, that the Secretary of State knew more about the evidence base than we did. In one sense that is great, but in another sense it illustrated to me the way in which we were perhaps failing to fulfil our function. The other thing was that I do not think we had the mechanisms in place to know who the academics were who were doing really serious rigorous work on what the impact of industrial strategy would be.

Lord Judge: Do you mind if I interrupt? I want to go back. I understood you to be giving us in effect a summary of a failure of will by the Civil Service to do what it is supposed to do. That is what I was looking for examples of, or have I misunderstood the evidence you have given?

Emran Mian: I cannot offhand think of examples when there has been a failure of will. Reflecting on occasions when there has been tension between a ministerial direction and the evidence base, I must say that for the most part the Civil Service has had the will to bring the evidence to bear on decision-making. I was commenting more on whether the Civil Service always has the capability and the capacity to enact that will.



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Q31 **Lord Pannick:** I want to follow up on transparency. You have both mentioned the importance of transparency when there is tension between Ministers and civil servants. Would you go further and accept that there is no justification for government not to publish the entire evidence base for legislative proposals, absent of course some particular fact of national security or commercial confidentiality? In principle, would you accept that?

Chris Walker: I would accept that, yes. Ultimately, if Parliament is to fulfil its function as a legislature scrutinising legislation, there has to be a level playing-field for access to evidence and information, both among the legislature and the Executive. I do not think we quite have that situation yet. To give an example, for new policies and legislative changes, we have policy impact assessments. It is fair to say that those impact assessments are of variable quality over the span of time, and they do not always include all the evidence that the Government have had when making their decisions.

Emran Mian: I agree in principle with what you said. It is often the case in specific policy commitments or specific policy consultations that the evidence base is not always presented in as transparent and clear a way as it should be, but when the Government publish a consultation paper you can see the structure of the argument by which they arrive at the policy direction, and the premises for the structure of that argument are usually evidenced either by reference to official statistics or by reference to other work that has taken place. When the Government proceed in the proper way through a policy consultation, the structure of the argument and the evidence base is clear—not always, but often.

Where it is much less clear is when the Government are making policy decisions via the two fiscal events—the Budget and the Autumn Statement—but, equally, when they are making policy decisions through the comprehensive spending review. The truncation of the policy argument in each of those events is such that it is much harder to divine what the evidence base is when policy decisions—often substantial ones—are made in the context of those fiscal events.

Chris Walker: The OBR is probably quite a good example of an independent institution that can help diffuse the evidence in a transparent way and has less political interference than in the past with regard to Budgets and Autumn Statements.

Q32 **Baroness Dean of Thornton-le-Fylde:** We have the evidence base and the draft legislation. Taking it to the next stage, how far do Governments go to test in pilots? We can all give evidence of legislation that has gone through that seemed absolutely the right thing to do at the time, but then the unintended consequences brought it into severe question. Last week, David Halpern of the Behavioural Insights Team at the Cabinet Office said, when talking about Brexit and switching from the EU to the UK, “There is a risk we just shift legislation from the EU context to the UK context without testing if there are alternative ways to deliver”. If you



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were looking at major change in other sectors in the UK, you would pilot it to see if it was going to work before you said, "That's what we are going to do". I know there has been a move towards piloting, but what do you think the reasons are for not carrying out more pilots? In other words, should there be almost mandatory pilot testing of any major piece of legislation?

Emran Mian: There are some pieces of legislation for which piloting does not feel appropriate. To use an example from my experience, I worked on the changes to higher education funding, as I said. We were moving to a regime in which there was a much higher ceiling on tuition fees, and that is the kind of case where it feels to me very difficult to do it on a pilot basis. In one sense, the argument for doing it on a pilot basis is very strong, because you can observe the effects on participation, et cetera, but it is hard to see how you could do it on a pilot basis. Would you allow four or five universities to raise their fees and then see what happens? The problem with doing that is, of course, that it has effects all the way through the rest of the sector.

For policies such as that—the big regulatory shift that Brexit will bring is another example—piloting feels inappropriate to the structure of the policy problem. That said, some of the times when we do not use a pilot we are not doing it for what I consider a good reason. We are sometimes doing it for a bad reason, which is a desire to just get on with it and enact the political decision. That is the reason why a pilot seems inappropriate; it is often read either by the political decision-maker—the Minister—or by the Opposition as foot-dragging. That is the reason why a pilot is not pursued, and that feels to me like a much less sound reason for failing to use piloting.

Baroness Dean of Thornton-le-Fylde: Are there criteria in a government department as to when they will or will not pilot?

Emran Mian: I have not, in any of my roles, come across a fixed set of criteria for when we do or do not pilot. It is a much more impressionistic judgment.

Chris Walker: Obviously Governments of both creeds have used pilots in their policy-making. Two policy areas I have been involved in used pilots: the pathways to work programme, which was part of welfare reforms leading up to 2007, and the extension of right to buy to housing association tenants, which I understand has just finished piloting. It was piloted by five housing associations, and it recently concluded.

Pilots are an important part of gathering the evidence base and there are instances where they have been used, but, as Emran says, sometimes the Government of the day just want to get on and implement the policy. There is always the time tension. Even if you can do a pilot, and all the right conditions are met to do a pilot, it will not always be the case that it necessarily adds to the evidence base. One of the reasons to do a pilot is to test a behavioural response. Of course, another way to get at



behaviour responses is to look at experimental economics of the type that the Behavioural Insights Team looks at. There are ways of getting at things other than pilots.

- Q33 **Lord Norton of Louth:** I want to bring Parliament into the process, because so far we have focused on evidence collection and analysis within government itself. When the Government bring forward a policy, Parliament has a role to play, not least in testing the evidence base and knowing what it is. There are two elements of that. One is the process. At what point does Parliament come into the process, and how much of a role can Parliament play before a Bill is formally drafted and introduced? Is there a case for greater pre-legislative scrutiny? Of course, to test the evidence we need to know what the evidence is. Is there more that Parliament could do to ensure that it is actually eking out of the Government the evidence on which they are relying?

Chris Walker: Possibly. In my experience, the work and political deliberation that goes into preparing a Bill tends to go right up to the wire, as you can possibly imagine. There is a question of whether that is practically possible. Unless I have misunderstood the point, you would not know what legislation you were going to be scrutinising, because you would not know what was in the Bill until it was introduced. It is a bit of a chicken and egg situation. Obviously, you could lengthen the legislative timescale, but time is tight.

Emran Mian: You referred to the greater use of pre-legislative scrutiny. That is the most obvious and probably the most effective tool to provide Parliament with the clearest possible evidence base, and to provide parliamentarians with the longest possible period of time in which to gather their own impression of the evidence and to use that to scrutinise government legislation.

When government is pursuing policy objectives through legislation, that is probably our best case for evidence being used in the policy-making process. It is partly due to the expectation of scrutiny. It is due to the fact that Committees such as this will themselves consult experts in the field. There are various reasons why something that government is trying to do through legislation will, even from the Government's side, require an evidence base that something that is not being done through legislation will not necessarily require. The area I feel most concerned about is when government is trying to enact policy objectives without needing legislation. That is probably where some of the most serious gaps are in whether it is consulting the evidence base early enough.

Lord Norton of Louth: For the route there, one relies on Select Committees of the two Houses to find out what is going on and to check the evidence.

Emran Mian: Yes, that is right. We rely greatly on departmental Select Committees. There might be things to do around that. Lots of departmental Select Committees have expert advisers. Increasing the



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scope for that would feel like a good approach. It is often very hard to see how a single expert adviser, or two of them, might be able to cover the entire span of what a department is doing, especially something like the Department for Exiting the EU. It is difficult for me to see how one expert adviser, or even a small group of expert advisers, might be able to help that Committee be as effective as it could be in scrutinising the Government's plans. Expanding the capacity of Select Committees to use expertise would be very positive. The other dimension would be relying on the desire and the capability of the Civil Service to bring evidence-making to bear.

Lord Norton of Louth: Absolutely. Is there more one can do there? Presumably when the Government bring forward evidence, it is quite often interested evidence, in the sense of, "This is the evidence to support what we are bringing forward, but we are not necessarily telling you about material we have that may not support the case". Is it in a sense an attitude that we have to address as much as anything—to eke that out and make sure we are assessing the full gamut of evidence and not simply what is presented?

Emran Mian: I think that is right. I can think of at least a couple of policy White Papers where there was a serious attempt by the Government to engage with some of the evidence against the proposition that they were putting forward, and then to explain why that evidence should not determine the decision being made. On the whole, though, government policy papers ignore, sideline or even at times ridicule evidence against the policy intention that they are pursuing. It is a question of tone.

There are also some quite soft things in the mix. Often, people from the evidence streams in the Civil Service are given much less prominence in policy-making processes than are the policy civil servants. We rely to an inordinate extent on policy civil servants being interested and curious about evidence. Some of them are and some of them are not. We fail to bring in economists or social researchers. They very rarely get to see Ministers, and they are very rarely in the room when something is being considered. That soft stuff really does matter in the end. Government lawyers will be in the room much more frequently when a decision is being made; economists and social researchers often will not be. In the end, that kind of thing has an impact on how decisions are made and how documents are written.

Lord Norton of Louth: I presume from what you are saying that, from a parliamentary point of view, the point about capacity for Committees would be Committees having the capacity themselves to pick up the phone and talk to academics who are researching in the area so that they have something against which to test the Government's evidence.

Emran Mian: Thinking about it from the academics' point of view, I wonder whether there is more we should be doing to support early career researchers, in giving them the time and space to engage with policy-



making processes, and indeed parliamentary processes. That is a difficult thing for early career researchers to do. Those who are extremely enthusiastic about wanting to do it, and feel that it is part of their duty, will do it, but it is very much a discretionary activity for them; personal desire is leading it. There is no funding tied up with it; there is no career preference tied up with it. Your head of department is very unlikely to promote you on the basis of that kind of activity. Addressing some of those incentives would be quite an important thing to do.

Q34 Lord Hunt of Wirral: How should government departments engage with the wider public in acquiring evidence for policy and legislation, and then making that evidence known? Is there a role for new technology in that regard, or perhaps better use of existing technology?

Chris Walker: It is an interesting question. The typical answer is the use of consultations and the use of calls for evidence in order to gather evidence from the public, professionals and professional bodies. In the last 10 or 20 years, much greater use has been made of the internet and online technology to get at some of that. Alas, that is not quite so old now. Another interesting area is the use of ways of collating information by the public, almost of a Wikipedia type. That is quite an interesting concept.

For me, one of the most exciting developments in government at the moment is open data, and making data available to the public and professionals so that they can scrutinise it, and feed in through various channels to the policy-making process. I hope ultimately we will get to a situation where it is not just you, as Parliament, scrutinising government policy, but the public at large are much more able to scrutinise policy. Open data has a really important role in that.

Emran Mian: The other role that technology can play, which the Government do not exploit at the moment, is that it could allow for personalisation of the way in which people respond to consultations. At the moment, there is the equivalent of a sheet at the back of the consultation paper that has a set of questions, and those questions are addressed to any audience. They are written in a way that does not differentiate a generalist member of the public and a specialist. To me, that feels like an approach we no longer need to take.

It should be easy for somebody to respond to a consultation through technology. Let us say you are an education expert and you are commenting on an education White Paper. The Government should seek your view in much more detail on specific propositions than if you were a member of the public responding to that consultation paper. What technology should do very simply is allow the consultation response to be taken in a range of different ways, depending on the level of expertise or the nature of the expertise of the person responding, so that people could see different sets of questions depending on what their expertise is. That kind of tailoring is very easy to do through a government website, but government departments do not currently do it.



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Lord Hunt of Wirral: One of the reasons may be that they rely on trade bodies to give a view on behalf of their members. You are suggesting that government departments should go direct to their members. You would have a wonderful opportunity to get free legal advice by targeting questions to all the lawyers. Is that something that you are aware has ever been considered? In the past, consultation papers used to have just some general questions. They have become much more specific, but they are not targeted. Has that ever been contemplated? Are we pushing at a slightly open door in advocating better systematic targeting on particular questions?

Emran Mian: My view would be that we are pushing at an open door. I do not think there is a significant cost associated with government doing it in that way. There are potentially lots of upsides for government in doing that kind of targeting. The technology makes it easy to do. There is still a question about the incentives for respondents to respond to something that might require a lot more discretionary effort and time from them. There is definitely an open question about that, but it is easy for government—from the supply side—to fix the way in which it seeks input to consultations.

Lord MacGregor of Pulham Market: You would have to be careful; opponents of a particular piece of legislation or proposal would be more likely to respond than supporters.

Emran Mian: Yes. That is an issue the Government face all the time. They have evolved a range of techniques to ensure that they get a broad range of opinion. One of the ways, for example, is that alongside a consultation paper they hold a set of consultation events. The consultation events are often with representatives of the sector, and the people who tend to go to them either provide a more balanced view or might be supportive of the proposals. You end up creating a balance between the responses you get in that way. I am not endorsing that tactic; I am just saying that the Government have a way of dealing with that situation. It does not seem to me that that should be a block to consulting in a different way.

The Chairman: We must come to the last question. Lady Taylor will ask it.

Q35 **Baroness Taylor of Bolton:** There has been increasing criticism in recent years about the quality of legislation that comes to Parliament, about the fact that the Government introduce a Bill and then introduce hundreds of amendments—or maybe 1,000—to their own legislation, and that a lot is done by secondary legislation, which is increasingly complex and difficult. There have been suggestions that there should be standards for legislation being introduced.

Could there be one standard? Bills are presented to a Cabinet Committee, where they are signed off by the Treasury, or on environmental grounds, human rights and things of that kind. There has been a suggestion that



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there should be a legislative scrutiny committee, perhaps of both Houses. In your view, what is the practicality of one standard for all pieces of legislation, and what is the role that the evidence base could play in that, bearing in mind that at the end of the day we are not just looking at policy as an academic exercise; it is also about political delivery?

Chris Walker: Having a single standard would be tremendously helpful. The question is how we can achieve that in a pragmatic way. I talked earlier about impact assessments, for example. Having a good single bar as a standard to which all impact assessments have to adhere would be tremendously helpful. The difficulty is in how you achieve it. Do you make it some kind of tick-box exercise by which you say, "Okay, I have met that criterion, I have done that and I have done that"? That could be quite easily done and co-ordinated through the Cabinet Office, so that there was at least a good but stringent set of guidelines that all impact assessments had to follow.

Emran Mian: I agree with that. I have nothing to add.

The Chairman: How very tactful of you. That brings us in on time. Thank you both very much. We only had half an hour or so, but we have put it to enormously good use. We are very grateful to you for giving us your knowledge and experience on these matters, and for your productivity. We have a lot to look over as we peruse the evidence, when the text arrives on our desk. Thank you very much for coming.

Examination of witnesses

Alison Harvey and Peter Jorro.

Q36 **The Chairman:** You will have heard me say to the outgoing witnesses that we have a packed programme today. It is the story of our lives these days, for reasons that you will understand. There is a lot of constitutional stuff going on at the moment. That does not in any way diminish our gratitude to you for coming to see us. You both have enormous experience in the immigration field, and we are keen to learn more about it. Thank you, Ms Harvey, for the paper that you produced. I said to the Committee that it was one of the most depressing papers that I have read for a while, but that in no way detracts from its quality and value. We are very grateful.

We have a number of questions to put to you. I will start with the first one. Ms Harvey, your association has been forthright in criticising immigration legislation. Do you think the criticisms spring from lack of clarity or consistency, or could it be disagreement with the objectives of legislation? How would you define the way in which your criticisms emerge?



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Alison Harvey: We disagree with many of the objectives of legislation, but after so many years there is a whole separate vein of frustration about the quality and clarity of legislation. The clause whose content I like least, in any Bill, is the ouster clause of 2004. In drafting terms, it is my favourite. It gave the Government of the day exactly what they wanted—the death of the rule of law—and did it so clearly and lucidly that no Parliament could ever have passed it.

The Chairman: That is the sort of criticism we were expecting to hear from you. Mr Jorro, would you like to add anything as a general view?

Peter Jorro: Yes. Part of the issue is that immigration law is peculiarly political, so you are immediately taking a side. A lot of policy that becomes legislation is effectively announced at party conferences.

Aside from that, there is also the business of the constant changes. A particular issue for me, as a practitioner, is the appeal rights. Back in the days when I started practising in the area, appeal rights under the Immigration Act 1971 were quite limited. Legislative changes brought in more and more appeal rights—merits appeals—and then legislative changes took them away. That kind of approach, with constant changing, makes it very difficult, for example, for practitioners to advise people on how things will be in the future.

It is incredibly abstruse. We now have a large number of Acts of Parliament dealing with immigration. By some calculations, there are 14 or 15 of them. There is a very strong case for consolidation, and for less regular changes to it all. It is so driven, from such a strong political point of view, that we have major Acts of Parliament dealing with immigration every two years. Before that, it was every three years. For a long time, there did not seem to be that need. Between 1971 and 1988, there were just two Acts. Since then, through the 1990s and the 2000s, the Labour Government, the coalition Government and now the Conservative Government have kept changing the law, often by giving something—appeal rights are of particular interest to me—and then taking it away, with no obvious policy benefit or anything else for that.

We need consolidation and clarification. There is now the problem that senior judges in the Court of Appeal, in a recent case involving a particular piece of legislation about extending the right to remain while appeals are going forward, are criticising how abstruse the law has become in this area and are crying out for clarity. A lot of people—litigants—need to know what immigration law is without having to go to expensive lawyers, who themselves have to go through huge numbers of different provisions in order to advise them, often on a provisional basis, because it might change next year.

The Chairman: That echoes other criticisms that we have heard.

Lord Beith: Am I right in thinking that one of the reasons for this very frequent legislation is that the Government lose so many cases that they



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are therefore constantly firefighting, trying to put law into what they thought they or their predecessors had done in the first place? That probably arises because when the law was originally drafted not enough thought was given, for example, to interaction with the European Convention on Human Rights or other international rights. The law was inadequate in the first place, so the Government constantly return to it as a result of cases that they have lost, which undermine their policy objectives.

Alison Harvey: That can be true, but the case to which Peter has just referred was one where the Government argued a position we would have agreed with. The Court of Appeal disagreed. The case is now pending before the Supreme Court. During the passage of the Bill, we brought forward amendments to give effect to the position the Government had argued for, but they said, "No, we have decided that we can live with what the Court of Appeal has done". The confusion and the abstruse nature of the law therefore remain.

There are a number of examples where, if there was a problem in court cases, it was very often a problem that Committees such as this one described when the legislation was going through. They said, "You are going to come under attack. That is not going to stand up to challenge". It was passed none the less, and, lo and behold, it comes back to court. Often, the solution is not to take stock of that. We have a huge amount of legislation since the early 2000s drafted to say, "Do X, do Y and do Z, unless to do so would be a breach of human rights". Rather than trying to make your legislation human rights-compatible in the first place, you put in that human rights longstop. The only way you sort out what the longstop means is by litigating.

Q37 **Lord Judge:** You have described a nightmare situation. Let us have a happy dream. Tell us, shortly if you can, what good immigration law would look like.

Peter Jorro: Obviously, there will always be people who do not like the effect of it. We will put that aside, because I take your point.

The Chairman: Forgive me, could you speak into the microphone? The acoustics are not good in this room.

Peter Jorro: I am sorry. Obviously, there will always be people who object to the effect of good immigration law, but that is a separate issue. We accept that. The starting point for good immigration law is a consolidated statute. That is now increasingly imperative, so that you can look to one thing: an immigration and nationality Act that incorporates all the current provisions in the current levels of law and sets out the basis of powers for those who control immigration and the rights of individuals affected by it, so that it is all set out as much as possible in statutory form.



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With immigration law, you have to understand that you have the statutes—multiple—and numerous statutory instruments putting them into effect in various ways. You also now have this enormous thing called the immigration rules. A few years ago, you could set the immigration rules in a document this big. Now it is like this—entirely prescriptive. All of that is problematic from the point of view of good administration. Clearly, what you want is for people who are affected by immigration law to be able at least to see the basic provisions and to find them reasonably easily on the internet, without having to go through enormous research levels. Good immigration law would be consolidated, preferably in a single statute—obviously, you would have to have statutory instruments and immigration rules—and would set out the broad powers and rights. I would also like proper merits appeals provided for in that statutory scheme.

Q38 Lord MacLennan of Rogart: The existing complexity of immigration law and the frequency of changes make it difficult for applicants to know where they are. What changes would you propose in the Government's approach to immigration legislation?

Alison Harvey: Consolidation would be the big one, because you do not know what you do not know. That would make a huge difference. The rules are a tremendous problem. Every time you change the rules, you have to deal with people already in existence, so every layer of primary and secondary legislation is complicated by transitional provisions. People read things and think that they apply to them, but they do not. Simplified versions of explanations on the Home Office website simply mislead people. They read that they have to put in their bank statements. Only by going through several appendices of the immigration rules will they learn that printing off their bank statements from the internet, if they only have an online bank, is not satisfactory; they have to have a letter from the bank to validate them or they will be rejected. Ordinary words turn out to be terms of art.

We are in the place we are in with the immigration rules because a Supreme Court judgment said that you cannot have mandatory grounds for refusal in guidance; they must be in the rules. Overnight, the immigration rules grew by hundreds of pages. They have continued to grow ever since, as the Home Office spots more and more mandatory grounds for refusal. If it merely gave itself the discretion to exercise judgment, none of those things would need to be in the rules, because they would not be mandatory. Instead, the only provision for the exercise of discretion in the rules is for discretion to be used against you—extra grounds on which, even though you tick all the boxes, you can be refused, rather than extra grounds on which, despite not ticking a box, you can be accepted.

Lord MacLennan of Rogart: Who do you suggest should initiate the consolidation?



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Alison Harvey: We have asked the Law Commission. We have sought repeatedly to interest it. I have just sent off our briefing for its 13th programme of law reform, to try to tempt it. In the first instance, there has to be a pure consolidation, because I do not think there is parliamentary time to deal with something that is not a consolidating Bill. Despite all the flaws in the current legislation, step 1 is to put it all together and get it into one Bill. We can then work towards the second stage, which would be a simplification and producing the Bill that Peter described. We will only get parliamentary time if we do a consolidating Bill.

Lord Pannick: Do you think that clarity and other objectives might be achieved if the Home Office no longer had a power to make rules but had to produce a statutory instrument that went before Parliament, or would that make no difference?

Peter Jorro: It is an interesting proposal. There is a very interesting debate, of which my Lord will be very aware, on the exact role and legal status of the immigration rules. On one level, they are Home Office policy to be applied. Obviously, the Home Office will say that it is doing a good thing by showing in its rules what the policy is. It will always have the point that there is provision to go outside the rules, under the primary powers in Section 3 of the Immigration Act 1971, which will still be there. As to whether it would make much difference if it had to go through statutory instrument, the main point is that, hopefully, that would provide for greater scrutiny of changes by Parliament, and that can only be a positive thing. I would support a greater scrutiny role through secondary legislation rather than rules.

Alison Harvey: Within the immigration rules, there are provisions of different importance. There are the incredibly banal statements about bank accounts and some big, thick concepts. At the moment, they all sit on the same level. Because they are so massive, when they are laid before Parliament—they can be opposed through debates in Parliament—there are so many different things that you end up homing in on just one. There are pages and pages of legislation that never get scrutinised, and will cause all sorts of problems.

Baroness Taylor of Bolton: I want to follow up what you said about discretionary powers. I can see why you said it. If we are trying to have clarity for applicants, yet there is more discretion, the clarity ceases to be as clear.

Alison Harvey: That was probably the idea of the points-based system. It was trumpeted as a big simplification—people would be able to go on to the website and work out whether their application would be accepted or refused before they submitted it and spent their £1,000 on putting it in. It has not worked like that. It is so technical and complicated. We mostly see people who have been refused because they failed to understand those rules, which are incredibly difficult to understand.



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Peter Jorro: The idea of the points-based system was to take discretion away from decision-makers, because people simply score points or they do not. The problem was that, to an extent, it made it easier for people who were trying to play the system to know what they needed to do to score the points. People who had a genuine application to come here that was beneficial economically to the country could be refused because of some minor failure in the point-scoring, whereas somebody who was trying to play the system, but knew exactly what they were doing with the point-scoring, could score the points. The Government realised that, of course, so they reintroduced discretion, whereby there was the business of refusing, for other reasons, the people who had scored the points, with the result that the thing went around in a great big circle again.

Baroness Taylor of Bolton: That is discretion for refusing, not discretion for accepting.

Peter Jorro: No—

Alison Harvey: There is none of that.

Peter Jorro: There is an overriding discretion. The Secretary of State for the Home Department can grant anyone leave to enter or leave to remain in this country, on any basis she chooses. That is provided for by the Immigration Act. It would be a mistake to try to take that away. The overriding discretion is a good thing. That is a separate issue from the sort of clarity that we want from the point of view of people seeing what they need to be able to show the immigration determiners, in order to be able to gain entry or to stay.

Q39 **Lord Beith:** To round off the parliamentary point, in your paper you gave us a very helpful history of the sad story of the 2008 simplification Bill. You are firm in your view that a consolidation Bill should be attempted in the first instance and that any attempt to change the law by way of that would sink the project.

Alison Harvey: Yes. That is the main reason why that one sunk. There was a desire to change the law at the same time as consolidating it. That is what killed it.

Lord Beith: Would it make a significant difference to the quality of immigration law if there were greater policy, legal or drafting expertise in the Home Office?

Alison Harvey: There is some tremendous expertise in the Home Office. There are people who have been doing this for many years and they know an incredible amount. There are simply not enough of them for the volume of legislation. Some of it is being done by people who do not have that expertise. When you are turning out secondary legislation and rules to the extent that the Home Office is, you could do with a drafting team who have the same skills as parliamentary counsel.



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So much has been devolved to statutory instruments. In the most recent Immigration Act, the policy on asylum support, for example, which was changed in the course of scrutiny, was not fully worked out by the time the Bill completed its passage. You therefore have this incredibly portmanteau legislation, to leave room to go in different ways. That will happen in statutory instruments, and much will depend on how well they are drafted. Either parliamentary counsel's time has to be found to draft the Home Office's statutory instruments, which is probably not possible given the number it produces, or it must have that kind of expertise in-house.

Lord Beith: Primary legislation can be amended in either House, and regularly is. Secondary legislation, in almost all cases, cannot. Does that make a difference to the quality, and to dealing with potential drafting errors in secondary legislation?

Alison Harvey: It makes a huge difference. If you look up the immigration rules on the website, you find that nearly all of them have erratum slips, and some are very lengthy indeed. With secondary legislation, the problem is that we see it only when it is laid before Parliament. We get in touch with the Home Office, as we did on the commencement order for the 2016 Act, and say, "You have made a mistake. You are going to turn this cohort of persons into criminals on the day that comes into force". It had to scrabble around and produce a separate transitional provisions order. If you had been able to amend it, you could have slotted a clause into the commencement order and solved the problem we had identified. It was not controversial.

Peter Jorro: There is obviously a case for greater consultation at an early stage, with the Practitioners' Association, for example. I accept the point that was made earlier that there is a tendency for people who oppose legislation to reply more readily to consultations. If there were a greater channel between the Home Office and, for example, Alison and the Immigration Law Practitioners' Association, things could at least be set out. The Government have to make policy, and that is understood, but if there was greater consultation at an earlier stage of the drafting with those who, after all, practise in the courts and advise people who are affected by it, it could be very helpful for all concerned, without surrendering any of the policy considerations to such an organisation.

Alison Harvey: We generally try to meet the Bill team, or open channels of communication, as soon as we see a Bill, to raise anything that we think is a technical problem. Rather than going through the Chinese whispers of someone tabling an amendment and a Minister responding, we go direct to the official and say, "We think you have got that clause wrong. We think it should say this". We get a fair amount sorted out in that way, but it only starts when we see the Bill.

Lord Beith: It only works with Bills. It does not work so well with statutory instruments.



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Alison Harvey: No. With statutory instruments, we do not usually see anything until they are there. We just have to wait. Of course, we do not always spot them. There are so many that you can come across one at a very late stage, or even when it has gone through.

The Chairman: Despite the difficult issues you have to deal with, are your relations with the Home Office satisfactory, from your point of view?

Alison Harvey: They vary from bit to bit of the Home Office. With Bill teams, they have always been fine. We have always had very good communication. They have taken time, even when they are incredibly busy, to answer our points, even when we have got it wrong.

Q40 **Lord Norton of Louth:** In a way, my question builds on what you were saying about consultation. What more can be done to ensure that there is greater engagement with stakeholders and those outside? In your paper, it is quite clear that you are not enamoured of the consultation process. When it takes place, it is rushed, you say. I get the impression from what you say that it is not really consultation; sometimes it is a selling exercise. What more could be done, and at what stage, to engage with those outside?

Alison Harvey: I would like to see some process of scrutiny of consultation documents, so that they are not allowed out when they are spin and misrepresent the evidence, and they are exposed to some quality control. Last night, I spent hours going through the impact assessment of the Ministry of Justice consultation on accelerated appeals in detention. It is a disgrace. It simply is not evidence. Those are not numbers. There is more discussion of why there is no evidence than of evidence.

Leading questions ought to be challenged. In my paper, I gave the example of the health charges consultation, where the Department of Health and the Home Office plainly could not even agree on the degree of spin and produced different consultations, of which the Department of Health paper was a vastly superior beast. I would like the opportunity to see drafts and be consulted on them.

Earlier, you talked about technology with the previous witnesses. The SurveyMonkey approach to consultation, where government count responses, has led a number of people outside to think that the more responses they make, the better. That completely overwhelms the civil servant wading through responses from 50 organisations saying nearly, but not quite, the same thing. If we could all get together and accept that less is more, we could get out of that headcount habit.

Peter Jorro: My personal experience of responding to consultations on behalf of Garden Court Chambers, for example, is the one that Alison described: we are all doing it separately because of the feeling that somehow more is better. In all the ones I have ever done, there is also the feeling that, whatever you say, the Government will go ahead with



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what they were going to do in the first place. That may be unfair, but my personal experience of a number of responses to consultations is that you feel that you are going through the motions. Whatever points you make, however good you think they are—that is obviously an issue—it will not make any difference, as they are going to do what they are going to do: most recently, for example, to raise significantly the fees for appeals.¹ I have not had a happy experience of consultation.

Lord Norton of Louth: Is there more that could be done? There is your point about evidence and greater transparency in what government brings forward. You also make the point that, when there are consultations, you should look for quality, rather than quantity, in the responses. Is there more we could do on process to ensure that there is greater openness, more consultation and greater engagement with stakeholders, so that it is not just a case of, “Oh, we had better hold a consultation for the sake of having one”?

Peter Jorro: For example—I do not know this; it is something all of you will know much more about than me—when the Government put forward a proposal that is then put into a statutory instrument, they consult, so people such as Alison and, sometimes, me put in our view of it. To what extent is that then shown to the legislators? Do they get the benefit, if that is the proper word, of the views of the consultees, or does it effectively mean that the Government do their consultation, that they themselves decide, “We have read everything that everybody else has said, but we are going to do it anyway”, and then they put what they were going to do anyway through the legislative process? Would it be beneficial if those who were legislating had sight of all the consultation responses, of what other people out there were saying? I do not know, but it seems to me a sensible thing. In other words, it would not simply be between the consultees and the Home Office.

Alison Harvey: I would particularly pick out the devolved Administrations. When immigration legislation starts to overlap with, encroach on and discuss areas within the competence of the devolved legislatures, generally everyone gets the England model. For example, in the latest Act, there was an extension of powers to give immigration officers multi-entry search warrants. Multi-entry warrants are not permitted in Scotland. Someone realised that at a late stage of the Bill and in went what I call the “Oops, we forgot Scotland” amendment. The job of looking for that is now shared among more people; it used to be Lady Carnegy of Lour, virtually on her own, going through every Bill to spot where Scotland had been forgotten. It would be much more sensible to say, “In England and Wales, we have multi-entry warrants. In Scotland, we do not. Which is most suitable for immigration officers?

¹ Mr Jorro contacted the Committee later to add that on 25 November 2016, the government announced “that it had decided to take stock, and review the level of fees payable for lodging immigration and asylum appeals, in light of representations made:” see <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-11-25/HCWS284>



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Which model should we follow?" because it is a power across the whole of the UK. That is never done. We should draw on those different experiences. The legal aid legislation did not look at the very different Scottish model, which was the best pilot we had to consult. It is not only groups such as ILPA; other government experience is not being drawn on to the extent it could be.

The Chairman: We have just enough time to squeeze in one last question.

Q41 **Lord Brennan:** If we are leaving the European Union, what is your view of the effect of that on legislation about immigration?

Peter Jorro: It is interesting. Basically, the current approach is that, because of provision in the Immigration Act 1988, people who are exercising treaty rights vis-à-vis the European Union are exempt from current immigration controls. On one level, one might say that, to the degree to which that starts to disappear, current immigration legislation will apply to more people. On the most simplistic level, it will not have a significant effect, because it will all be about transitional provisions within the European Economic Area regulations.

There are obviously issues to do with how you will have border control in Ireland, which, after all, is a large part of the Brexit issue. There are devolved issues between Scotland and Ireland. Will you have border control between Northern Ireland and the Republic of Ireland? What will the legislative effect of that be? There could be issues. In overall immigration legislation, the provisions about the European Union will be taken out, in a sense.

Alison Harvey: The latest European regulations are consolidating—they are wonderful from that point of view—but we have seen provisions in them that, on their face, we simply think are unlawful. There are provisions on the abuse of rights that run directly contrary to the judgment of the Court of Justice in *Akrich*. We simply anticipate that the sums have been done that we will not get to the Court of Justice to challenge those provisions before we have left the EU. That is a worrying tendency and exaggerates an existing trend.

Again, the devolution aspect is relevant. The Government in Westminster say, "If it is immigration, it is reserved". The Administrations in Scotland, Northern Ireland and Wales say, "Hang on, this is housing. This interferes with law on housing or children. That is devolved. It is us". Peter described the simple version, but if the rights of European nationals are not simply that they are treated as third-country nationals after Brexit, and an attempt is made to give special privileges either to those already here or to those already here and those who will come, the question of the division between Westminster and the devolved Administrations may determine who gets to decide whether they keep special privileges. Does Scotland decide whether they are not treated as third-country nationals for housing purposes, or does England and Wales?



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Already we see Brexit occupying a huge amount of Home Office time and energy, and siphoning off a lot of its talent, because it is the most interesting thing to work on that anyone has seen. If we seek to give European nationals special privileges, the task will be massive. Potentially, we face documenting 3 million people in a process that will involve deciding their applications. We will have to have a simple process to do it, but if we have a simple process, we will be revisiting it later saying that people got in who should not have. The scale of the chaos that it could cause is immense.

Lord Brennan: What steps are your organisation and people like you taking better to inform government and the people about what is going to happen and what is involved?

Alison Harvey: Before the referendum, we commissioned a series of papers from experts—people such as Professor Elspeth Guild, Professor Bernard Ryan and Nuala Mole. Those are on our website. We have built on those and on that group of experts to reply to some—alas, not all—of the Select Committees consulting on immigration and Brexit. For example, we have done a paper on the Irish border issue and papers for the EU Select Committee. I have a paper for the Justice Committee. We are really trying to get those papers out.

The EU position papers were deliberately written for non-lawyers and deliberately kept to four sides in length, so that they introduced people to the issues. We have tried to provide some information. For example, Professor Guild has just written a paper for us on the common immigration policy, which will set the floor for British citizens' rights in the EU following Brexit. It may not set the ceiling, but it will be the minimum: your rights on long residence, your rights to family reunion and your rights to move as a skilled worker or student. Because of the common immigration policy, British nationals in the EU have a degree of certainty that EEA nationals in the UK do not have. Because the UK, with Ireland and Denmark, opted out, it is not well known in the UK, so people presume that everything is up for grabs in a way it is not.

The Chairman: That is where we must draw things to an end. It has been an enormously helpful session. You have been very informative and you have shared your experiences and frustrations with us. As witnesses, you complemented each other very well, so we have had some really good answers from you. Thank you very much.

Examination of witnesses

Sir Ernest Ryder, Judge Michael Clements and Judge Julian Phillips.

Q42 **The Chairman:** We are grateful for the opportunity of having a serried



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rank of three judges. Thank you very much for coming. You all share experience in the subject matter of today's session—immigration, tribunals, asylum and refugees—so we very much value this opportunity to ask you questions. I will start the session with what I suppose is a slightly provocative approach. The Office of the Parliamentary Counsel has described immigration law as "good law": law that is necessary, clear, coherent, effective and accessible. I am tempted to say, "Do you agree?" but I do not want a one-word answer.

Sir Ernest Ryder: The one-word answer is no. Of course, it is necessary. Effective immigration control and international obligations are taken as read, but can I give your Lordships a summary of why it is not clear, consistent or accessible?

The Chairman: Please do.

Sir Ernest Ryder: We have had eight immigration Acts in 12 years, three EU directives and approximately—my apologies for being approximate—30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in—if I may say so—rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant whose first language is not English and you have no recourse to public funding, because this is an immigration case, not an asylum case, your chances of accessing any of that material and putting it together in a coherent way are negligible. I have to add that most material that comes before Parliament is by negative resolution, so scrutiny of it is necessarily much less than it would be if it was in another form.

The Chairman: Judge Clements, would you like to add anything?

Judge Michael Clements: I have nothing further to add. The main difficulty the judiciary has is the complexity of the law and the fact that statutes are brought in that not only amend the law but create new law. There are also the transitional provisions, which we will probably come to at a later stage. The complexity of the law is such that, when I first started some 15 years ago, one would expect to deal with a number of appeals every day. Nowadays, one is pushed to do more than two. The work is more complex and the rules are more complex, and that has a knock-on effect on workload and dealing with listing.

Judge Julian Phillips: The only thing I would add is that the 97 changes to the Immigration Rules in 10 years that Sir Ernest mentioned sound as



though each time they are minor changes to a word here or there. They are not; they are fully fledged statutory instruments that change, sometimes substantially, what the Immigration Rules say and add to them. As Sir Ernest mentioned, the rules have increased by four times in 10 years. When the current Immigration Rules, HC 395, were introduced as a consolidating set of rules in 1994, they were about 100 pages long. By 2004, they had grown to just under 150, so there was a 50% increase in the first 10 years, but in the next 10 years or so there was a 400% increase on top of that, so that is complexity.

The Chairman: That sets the scene very well.

Q43 **Lord Pannick:** Can you tell us something about the practical difficulties faced by the judiciary in this area, as regards the number of judges and the training and experience of judges?

Sir Ernest Ryder: Let me start by setting the context. As everyone here will know, there is no incentive not to appeal in this area of the law. One must expect, therefore, most asylum seekers and immigration appellants to use the appeal system provided for them, but the appeal system is used multiply, because we set out in our rather incoherent legislation defined routes of appeal that we then restrict. People then use judicial review as the alternative, because they have no statutory right of appeal. If one puts that into the context of people not understanding English as their first language and not having a legal adviser for the majority of the material that comes before the first tier, the first-tier judge has the obligation to understand the interplay between the primary legislation, the routes that have been provided for appeal and the alternatives to be found by the wise or advised appellant. There will not be somebody to explain something if it has not been caught on paper or in oral submissions before them. That is quite an obligation to put on a judge.

My judges, like all lawyers, enjoy the complexity of the law; it is what, with their public service ethic, drives them. It is their interest in life, but there is a limit to that, because the user cannot find it, and even if they find it, they do not necessarily understand it. The classic example is the deemed human rights appeal, which, if I may, I will ask Judge Phillips or Judge Clements to explain. We went down to four statutory routes of appeal in the last Act, but there is now a deemed human rights provision, and that sets up a particular problem that a litigant faces.

Judge Julian Phillips: Looking first at that problem, there was the famous reduction in the rights of appeal from 17 to four. From April 2015, that took out all Immigration Rules rights of appeal. However, at the same time, alongside that was introduced what was called a deemed human rights appeal. The deemed human rights appeal was made apparent by way of an appendix to the Immigration Rules then produced called appendix AR, which stands for administrative review. That explained to people who no longer had an Immigration Rules right of appeal that they could apply for administrative review in certain cases, but not in cases involving family and private life. Of course, a substantial



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number of cases do involve family and private life. Those applications made under the Immigration Rules were deemed by the appendix to be human rights applications, thus giving a human rights right of appeal.

The human rights right of appeal, however, was made as a result of an Immigration Rules application. As far as the individual is concerned, they have made an application under the Immigration Rules. As far as the judge is concerned, their right of appeal is a human rights appeal because the Government have said it is a deemed human rights appeal, but to decide whether their human rights have been breached—I see this is already making everybody feel a bit confused—the judge has to go back and look at whether or not they satisfy the Immigration Rules, because if they satisfied the Immigration Rules there would be no public interest in refusing their application. A deemed human rights appeal is no longer an Immigration Rules appeal, but the judge has to consider the Immigration Rules to decide whether human rights have been breached.

The Chairman: Judge Clements, confuse us further.

Judge Michael Clements: I hope not. Another area that we have not touched upon is the thing called Home Office guidance. Home Office guidance does not form part of statute or statutory instruments. However, the Home Office produces masses of guidance that we need to be aware of, or certainly the person making an application needs to be aware of. Not all of it is widely distributed. Sometimes you have to root around to find out what the policy guidance from the Home Office is.

We work in an adversarial tribunal. Unless the Home Office representative comes along armed with guidance, or whatever, we are in difficulties. I accept that has moved on to a certain extent, because we do not have so many of those appeals before us, but certain parts of the guidance have started to form policy, such as the Immigration Rules for families. Some of the Home Office policy is very well publicised; some is not, and, if the Home Office has not followed its policy on a human rights application, that can be an issue.

Q44 **Baroness Taylor of Bolton:** To follow up what Sir Ernest said earlier, I think you said that many applicants do not have legal advisers. You have just convinced us of the complexities of all of this. Can you tell us the number of applicants who are trying to get through these myriad complications by themselves?

Judge Michael Clements: If it is a protection claim or if you are detained, it is probable that you will qualify for legal aid. Not everybody does, and there are still delays in legal aid. Obviously, the legal aid provisions in Scotland and Northern Ireland, where we also have courts and tribunals, are different. For all immigration matters there is now no legal aid. I was speaking to a senior legal person from a law representative society that works in the community. They basically said that they are now very pushed to give full advice on immigration matters. The society is not publicly funded; it gets funding from the community.



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Therefore, we have people coming before us who are not legally represented. That causes us difficulties, especially as these people often do not have English as their first language. It is a double hit, if I may put it like that.

Sir Ernest Ryder: You might well ask what is different in this jurisdiction from many others that have similar problems. One needs to reflect on the fact that many of the Home Office presenting officers will not themselves have the time and, some of them, the skill to act as specialist counsel would act in this field. They are not presenting a comprehensive overview of the law and the guidance to the tribunal.

The decision letters from the determining officers in the Home Office do not sufficiently rely on the law and guidance they are making decisions about and applying. Therefore, when our judges come to look at what is being appealed, neither the appellant nor the judge will necessarily know what issues will be pursued in the case. There is no tradition in this tribunal of case management in each case. If there were to be, we would have to double the number of hearings, and that is not a funded circumstance. We have to select what we case manage. Somebody who comes without English and without a legal adviser in a deemed human rights case thinking it is about the rules must have that explained to them before they even start. It is the best example we can give of just how difficult this can be on a daily basis.

Judge Julian Phillips: In the area of protection claims, where the majority of people will be legally aided, the law is relatively simple. The complex areas are the immigration cases. In protection claims, the Immigration Rules are based on the refugee convention and the EU qualification directive. It is fairly simple from a legal point of view, although difficult from a factual point of view. The complex rules are in immigration cases.

Q45 **Lord Beith:** Can you take us through what you do when faced with the situation you have just described? You have to establish in your mind—even you are not omniscient—not only what the law is but what it was at the time relevant to the case in front of you. What process do you go through, bearing in mind the lack of the advocacy that would otherwise provide you with some of the material?

Judge Michael Clements: We encourage all our judges to be in early. When I say early, it is probably not as early as you might think, but certainly by 8.30 am, and cases start at 10 am. That hour and a half is absolutely essential for preparation. It is a matter of going through the files, trying to identify the issues and, as and when necessary, speaking to other leadership judges as to matters that may arise. The answer to all of this is preparation, preparation, preparation. If the judge prepares the appeal prior to the hearing, there is a far better chance of their coming out of that hearing knowing the decision. Quite often, you come out of the hearing without necessarily knowing exactly what decision you are going to make. There may be other matters that you want to think about.



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Sir Ernest Ryder: One impact of the way we have to prepare chronologically by going back to find the guidance and the relevant legislation and what had and had not been commenced at the relevant time and now in every case, because you do not know from one case to another what you are going to face, is that the practice has developed over time—before my time—that all immigration judges take time out to write judgments instead of giving *ex tempore* judgments. That is not in the public interest. I can say that without having to talk to either of my colleagues to my left and right. In cases of this kind, before a tribunal that is not a court of record, you should have ample but short reasoning. That is not possible because of the lack of clarity in the law and the guidance. That is what we are trying to aim for, but it is quite difficult to do.

Judge Julian Phillips: When researching cases and looking at a matter beforehand, we have a legal research department that provides us online with a tracked version of the Immigration Rules, so we are able to look at a tracked version rather than going back through each edition separately. That is one way of doing it. Certainly, as far as unrepresented appellants are concerned, we do our best to assist. It is an adversarial situation, but we are increasingly becoming an inquisitorial jurisdiction.

Q46 **Lord Pannick:** Is it simplistic to say that, if the Home Office letter addressed all the relevant provisions and guidance, fewer of these appeals would succeed? You would have far less work, it would mean the waiting lists would be far shorter and people would have less inclination to appeal in bad cases. It is all because the Home Office does not do its job at the outset.

Sir Ernest Ryder: The quality of the determining officer decision is what drives the rest of the litigation path, so I would absolutely agree with that.

Lord Beith: The implication of that is that one of your main headaches arises from an administrative failing in the Home Office and would not be cured by better legislation.

Sir Ernest Ryder: I am happy to say that the determining officers are saddled with the same problem that advisers and judges have. They must find their way through the primary and secondary guidance material. Unless they can find a way of adequately summarising that in a letter, by identifying, as I would want a judge to do it, the factual premise upon which a decision is made and the applicable provisions that lead to the decision, it is exactly the same source problem. Overcomplexity and lack of coherence cause everybody the same problem.

Lord Beith: What would make a difference to the quality of immigration law?

Sir Ernest Ryder: Codification—that is the simplest route. It has been tried. Between 2007 and 2009, there was a Bill, which sadly failed,



almost certainly on the basis that it was just too difficult to achieve the end result, but it was a published Bill, with consultation. As I understand it, the Home Office at least acknowledges that that is an objective worthy of pursuit, but if, for example, one were to go to the Law Commission and ask it to do it as a neutral exercise under the special provisions that would then apply, it would need a period of 18 months or more, which is, if not a policy vacuum, at least minimal policy change to the statutory material. At least there is an appetite for it again, as people realise just how big the behemoth has become.

We could also look at codification and simplification of the Immigration Rules. As my colleagues have mentioned, there are elements that are not that contentious. The asylum element of what we deal with on a daily basis is relatively settled, and we know where we are going with it. That could be relatively easily taken to one side and clarified. I am sure most practitioners would say, "Could somebody be looking in parallel at the points-based system, please?", which would not be quite so easy to take to one side and clarify but urgently needs it. There could most certainly be that process.

The one way of preventing us getting to where we are at the moment would be much better pre-legislative discussion and consultation. We have very little discussion with the expert organisations, including the judiciary, before consultations come in writing. When we get consultations in writing—there are any number of examples—they are adversarial and leading in style; they do not give you an option but ask for a yes or no answer. Bearing in mind that the consultation is likely to be on a small element of problem solving that has arisen over the past year, it takes no strategic overview and does not allow an opportunity to provide coherence to the whole. It is simply another provision that is being inserted or removed, with another transitional and saving provision that has to be carefully scrutinised as to when it comes into effect in relation to which appeal. The simple answer is codification and simplification.

Q47 Lord Brennan: How do we achieve it? Is it possible for the judiciary to ask that the Law Commission set aside, with government help, time and staff to do it, coupled with work by the Home Office? For people like us, the fear is that, if nothing is done, the whole situation will implode into delay, expense and trouble in terms of public life in this country.

Sir Ernest Ryder: I respectfully agree with that. We already have the circumstance that delays in both asylum and detained migration cases are unacceptable to the public and the judiciary alike, to the extent that we have spent since the summer working on a whole series of proposals, administratively and judicially, to move as many resources into this field from elsewhere as we can. In a world where resources are short—for example, public law family proceedings are escalating in the same way as immigration and asylum claims—there is a clear debate as to who gets the spare resources first. There is sufficient will at the moment to send this matter to the Law Commission. That is not necessarily a guarantor of



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success; the commission would have to have the resources and the time, but I would have thought that would be a primary recommendation one might seriously consider and the judiciary would welcome.

On the Immigration Rules, although it is more difficult for the judiciary to enter what is essentially a policy arena, because the rules should be codified policy, there is nothing to stop the judiciary in an appropriate multidisciplinary environment discussing with the Home Office, the Ministry of Justice and interested parties how one can simplify the process and reduce it to something more accessible. We have to do that anyway. There is a very useful hook on which to hang it. We are at the moment reforming all courts and tribunal processes. That means effectively making them digital by default. You cannot make an area like this digital by default unless you understand the basics. It has to be reduced to plain language, in so far as that is a feasible proposition, so there is a real imperative to do it at the moment.

Lord Brennan: May I ask about the word “immigration”? It is used holistically in the media, judicially and in the statutes, yet there are major differences. There are asylum seekers, economic migrants and refugees from conflict, yet the world we live in talks about immigration.

Sir Ernest Ryder: Sometimes, when listening to expert commentary in this arena, you do not hear sufficient distinction of the asylum claims that we all agree should be dealt with within 12 weeks maximum and with clarity. Take the unaccompanied children we are dealing with in asylum claims at the moment; there is absolutely no basis on which they should wait a minute longer than necessary. There are very clear distinctions to be drawn between somebody in that category and somebody who is an economic migrant who has committed offences, may have had indefinite leave to remain and then stayed on as an overstayer and committed offences. There are policies that cover them, but multiple appeals from them will still be discovered in the system.

Judge Michael Clements: As you may recall, there was something called the fast-track procedure, and the 2014 rules were struck down as ultra vires. As a result, I set aside a fair number of asylum decisions. What is perhaps more concerning is that the fast track was meant to mean that you had an appeal and were then removed within so many days. I now have a number of applications from people who had their appeals under the 2005 procedure rules and who are making application to set aside. They are still in the country. If the Home Office felt that those people, who were asylum seekers and were detained, could be removed quickly, one wonders why they are still in the United Kingdom. I do not mention that as a political matter, but obviously judges sometimes feel concerned that they have made decisions dismissing appeals and nothing seems to happen as a result. Those people are detained for various reasons and come back before us on bail applications. It is a concern. Certainly, the Court of Appeal is about to hear the 2005 procedure rules fast track. I do not know which way it will go, but there



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are a number of people waiting in the wings for another hearing if those procedure rules are set aside.

Judge Julian Phillips: Sir Ernest was talking about consolidation and simplification. The feeling I am sure we are getting from you and you are getting from us is that consolidation and simplification is in everybody's interest, but we have to be very careful when we are deciding how it is to be done. It is very easy for us to say that we should simplify and consolidate. It is not so easy to do it. A perfect example is the points-based system. We heard years ago that we should in this country have an Australian-style points-based system. That phrase is still bandied about politically. A points-based system was introduced in 2007 to 2009 for non-family migration: students, work permits, entrepreneurs and so on. The most complex part of the immigration rules now is the simple points-based system. If we try to simplify again and go for, say, a points-based system for family members, the danger is that it will become another behemoth that we do not know what to do with.

Q48 **Lord Morgan:** We have discussed aspects of this already. What kind of changes do you think might be proposed in the Government's approach to immigration legislation? I have in mind the large categories of people, some of whom are not immigrants at all, who will, it seems, nevertheless come within the scope of the Immigration Rules. There is the separate case of overseas graduate students who many people think should not be in the total at all. What do you suggest should be the Government's basic approach to this? Do you feel that the Government have adequate political and legal expertise and competence to deal with these matters?

Sir Ernest Ryder: I will avoid straying into the policy arena, and I declare an interest in the educational sector, so I well understand your Lordship's point about the effect of policies on that sector. It is without doubt open to the Government to spend more time in the pre-legislative discussion and consultative arena to look at the unintended consequences of individual, piecemeal problem-solving. If there were to be one clear recommendation it would be that, whether or not we are doing it in the context of consolidation.

I can give you an example of consolidation that has worked. Most of the examples we have given you today, sadly, have been things that are perhaps not at their best. If you look at the Immigration (European Economic Area) Regulations 2016, there is an example of bringing together piecemeal change in one provision. That provision has a destination table of equivalence so that the user or judge can find what they are looking for. It is possible; these things can be done.

It is right to flag up that, both on policy and legal questions, the advice available to government outside the consultation arena is much less than it used to be. We see that in the appropriate bilateral discussions that we have with government. The changes to personnel and the lack of senior personnel involved in those debates are marked. That does not mean that there are not high quality people still in the system, but their



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workload is such that they are not able to give as much time to these issues as they used to. I see that in the tribunal's procedure committee, for example, where the separate rules relating to how the tribunals are run procedurally are recommended, discussed and eventually made with the Lord Chancellor's consent. One can wait a long time for legal advice from government to that body in order to get something to the stage of being drafted. That is unsatisfactory when there are things that we know need to be done.

I can give you one example in the policy arena that is not contentious. We still do not have rules for the immigration and asylum tribunal relating to children and vulnerable adults who are witnesses or parties who come before the tribunal and need assistance by way of litigation friends or otherwise. I am put in a position where there is no funding, because there is no rule, and that leaves people exposed. As a judge, I am entitled to comment that that is not an appropriate circumstance for those tribunals to find themselves in.

Judge Julian Phillips: In answer to Lord Morgan's question, this is a political matter. Beware thinking that there is a simple answer to a simple politically loaded question.

Judge Michael Clements: I have nothing to add.

The Chairman: That brings us to the end of our round of questions. I thank you most warmly for participating and bringing us enormously informative answers. Although it was a short session, it was intensely valuable and, taken with previous witnesses today, it makes the Gordian knot look like a piece of cake. Thank you very much indeed. You have contributed enormously to our studies for our report.