PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

CRIMINAL JUSTICE AND COURTS BILL

Third Sitting

Thursday 13 March 2014

(Morning)

CONTENTS

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Monday 17 March 2014

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: Sir Roger Gale, † Mr David Crausby

† Bray, Angie *(Ealing Central and Acton)* (Con)
Buckland, Mr Robert *(South Swindon)* (Con)
† Champion, Sarah *(Rotherham)* (Lab)
† Evennett, Mr David *(Lord Commissioner of Her Majesty's Treasury)*
† Hilling, Julie *(Bolton West)* (Lab)
Huppert, Dr Julian *(Cambridge)* (LD)
† Jarvis, Dan *(Barnsley Central)* (Lab)
† Kane, Mike *(Wythenshawe and Sale East)* (Lab)
† Metcalfe, Stephen *(South Basildon and East Thurrock)* (Con)
† Neill, Robert *(Bromley and Chislehurst)* (Con)
Opperman, Guy *(Hexham)* (Con)
Paisley, Ian *(North Antrim)* (DUP)
Qureshi, Yasmin *(Bolton South East)* (Lab)
Scott, Mr Lee *(Ilford North)* (Con)
† Slaughter, Mr Andy *(Hammersmith)* (Lab)
Smith, Sir Robert *(West Aberdeenshire and Kincardine)* (LD)
† Vara, Mr Shailesh *(Parliamentary Under-Secretary of State for Justice)*
† Vaz, Valerie *(Walsall South)* (Lab)
† Wright, Jeremy *(Parliamentary Under-Secretary of State for Justice)*

Georgina Holmes-Skelton, Matthew Hamlyn, *Committee Clerks*

† attended the Committee

Witnesses

Sara Ogilvie, Policy Officer, Liberty

Angela Patrick, Director of Human Rights Policy, Justice

Martha Spurrier, Consultant, Public Law Project

David Austin, Assistant Director, Policy and Public Affairs, British Board of Film Classification

Murray Perkins, Senior Examiner, British Board of Film Classification

Public Bill Committee

Thursday 13 March 2014

(Morning)

[Mr David Crausby *in the Chair*]

Criminal Justice and Courts Bill

11.30 am

The Committee deliberated in private.

Examination of Witnesses

Sara Ogilvie, Angela Patrick and Martha Spurrier gave evidence.

11.31 am

Q230 The Chair: Could the witnesses please introduce themselves for the record?

Sara Ogilvie: I am Sara Ogilvie, and I am from Liberty.

Angela Patrick: I am Angela Patrick, and I am director of human rights policy for Justice.

Martha Spurrier: I am Martha Spurrier, and I am a barrister at the Public Law Project.

Q231 Mr Andy Slaughter (Hammersmith) (Lab): May I ask you a fairly open question? Most of the briefings from your three organisations have concerned part 4 of the Bill. Could you summarise what your concerns are, both individually about the clauses in part 4 and compositely in terms of the impact that the measures will have on judicial review as a remedy? Could you also explain how that relates to other aspects of changes that are not in the Bill but which are connected to it, such as the effect on legal aid?

Martha Spurrier: Shall I start with some headline points? I suspect that we may well be agreed on these issues. Dealing first with the general context, obviously the provisions on judicial review in part 4 of the Bill need to be seen in the context of the draft regulations currently out for consultation, which deal with payment for judicial review before permission is granted to proceed to a substantive hearing.

The idea has been consulted on previously, and I think there is a wide consensus that that financial risk imposed on providers—including in situations where a third party entirely beyond the provider or the lay client means that the case will not go to the permission stage—will have a significant chilling effect on whether such judicial reviews are brought at all. There is also the wider context of the decline in availability of legal aid in the civil areas under the LASPO Act, with the proposed residence test and with changes to prison legal aid.

I turn to the headline points about part 4. The first thing to say is that we maintain that the evidence base for the proposals simply does not exist, and that the mischief that the proposals purport to be designed to meet has not been made out empirically by the Government. We also say that part 4 is entirely asymmetrical in favour of defendants. There is nothing to stop public bodies from bringing up greater costs than they need to, but there is a great deal to prevent claimants from bringing judicial review. In particular, the Bill is directed at claimants who have a public interest in the litigation and who may not even have an individual stake in the outcome.

The entirety of part 4 is also self-serving, in that its purpose is to insulate public bodies from judicial review—whether by design or coincidence, that will be the effect. The fact is that through the Bill, the Executive will be able to prevent or chill public interest challenges being brought against public body decision making. That will neither save costs nor increase public confidence in the system. There can be public confidence in a system only where public bodies are forced to act lawfully by the courts.

Angela Patrick: Justice's briefing paper starts with the headline of our concerns about part 4. We think that its provisions are unnecessary, ill-evidenced and potentially damaging. We start by outlining the fact that judicial review—this is trite; everyone who has spoken to you has already said it—is particularly important in the United Kingdom. We are a country without a written constitution to govern how the individual relates to the state. One of the main and key means by which individuals bring the state to account and ask whether it is acting within the bounds of the law, as defined by common law and statute, is asking judges to look at the matter and asking decision makers to think again.

We regret the fact that a number of the consultations that have gone before have not been based on a solid, evidence-based approach to the changes that the Government wish to make. Instead, we have seen regrettable, politicised language around assertions and implications about abuse of judicial review that not only are not supported by the figures produced, but in some cases are undermined by them. On three occasions we have tried, in consultation with Government, to highlight exactly how significant changes to judicial review are and why reformers should act with caution.

That is not to say—I know that the question was put to the Bar Council—that the Executive or Parliament should treat the courts or judicial review as somehow out of bounds. It is, of course, perfectly proper for Parliament to consider whether judicial review is working as an effective and accessible remedy and whether, as the Government are purporting to do, it is over-costly. However, given its constitutional significance and the fact that in most relevant cases the defendant will be a Government Department, public agency or public official who answers to Parliament, it is for Parliament and individual parliamentarians to hold reformers who ask for change to a high level of proof. We just do not think that the Government's case comes up to scratch.

Another question put to witnesses in the previous sitting was about whether judicial review was perfect, and sure, it might not be; there might be ways to save money and make it more efficient. Lots of respondents to the consultation, including the senior judiciary, suggested means by which we could look again. One example was asking about local authorities that pursue—in the words of the Lord Chancellor—"hopeless" defences at the cost to the taxpayer of pursuing litigation that has no potential prospect of success.

Instead of engaging with such legitimate alternatives to efficiency, the Government have, in our view, in the four proposals in the Bill and in the legal aid changes happening in parallel, approached the problem on a two-pronged mission. First, they are proposing financial disincentives, whether—as Martha suggested—by design or coincidence, to disincentivise claimants who wish to pursue judicial review and do not have significant independent means to do so otherwise.

The second element of the approach is fundamentally to restrict the ability of the courts to control public interest litigation. When we talk about public interest litigation, we talk about cases that are not claimed by the claimants to be in the public interest, but are determined by the judiciary to have a public interest element in the case proceeding to be heard.

The judiciary, through this Bill, is being constrained in how it can use its discretion to ensure that such cases are being heard effectively in circumstances where it would serve the wider public interest for them to be determined. That is our concern. We think that the Government have gone off on the wrong tack and that it is now for Parliament to ask some important questions about whether this is the right way forward.

Sara Ogilvie: I can only add to what my colleagues have said by saying that Liberty has focused almost exclusively on part 4, because we really believe that its proposals will make it difficult for individuals and organisations to participate in the judicial review process. The process is a really important way of holding public bodies to account, and the proposals really do need to be examined again, because blocking that access is not appropriate under the rule of law.

Q232 Mr Slaughter: You refer to some of the evidence we heard on Tuesday. Several points were put to the witnesses: the first was that what is in the Bill is not of great consequence. If proposals, such as those on standing and to restrict types of applicant, have been dropped, and other proposals arising out of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 changes to legal aid are outside the compass of the Bill, then what we have here are some pretty technical or minor changes to adjust the balance slightly. Would you agree with that?

Sara Ogilvie: I would completely disagree with that. The proposals in the Bill will not only act as a barrier to people using judicial review, but change the nature of judicial review. Going into the specifics may be helpful.

Clause 50 contains a proposal to change how the "no difference" argument operates. Judicial review is, as you say, a technical process: it is about technicalities, procedure and ensuring that the decision maker did all the right things and did everything that they were supposed to do before taking a decision. That is basically a procedural review. What the courts do in a judicial review is look at the outcome. They do not have to say whether they are happy with the outcome and they should not say whether the claimant was happy with the outcome; they just have to say whether the correct process was followed. The proposal in clause 50 would require judges to get into a much more substantive look at the merits of the case, rather than just sticking to the procedural case. Clause 50 would change the nature of judicial review. That is one thing that we are concerned about.

Angela Patrick: Going back to the original question about whether these are piddling procedural changes or massive constitutional changes, as some of us have suggested. I would put it a different way. Now that standing is gone as a risk that they are going to change the way that you get into a set of proceedings, the analogy is that the gates are open, but the pitch is skewed. You can still come in and play, but the rules will be shifted in such a way that it will be really unattractive to bother to put your boots on in the first place. The problem—it is highly likely that Liberty has talked about it—is that it will shift the judge's role.

I know it is not in the Bill, but, looking at legal aid, the change will create a significant deterrent to cases getting off the ground. It is unlikely that individuals will be able to access advice, and it will be difficult for them to secure advice and representations to take cases forward in the first place—unless they are not legally aided. This is not about ending judicial review, as one Member said yesterday. We want to clarify that this is not about killing judicial review; it is about nit-picking how it should work. We agree that the change will not kill judicial review, but it will act as a significant deterrent to those without independent means using that remedy on an equal basis.

These changes will not worry Virgin Trains if they want to challenge a procurement decision. It will be entirely open to those who have independent means to pursue judicial review. It will not be open to community groups who want to challenge the closure of libraries, individuals who are residents of care homes, people who may be disabled and worried about cuts to services, and a whole range of other individuals who may not have access to independent funding to pursue judicial review challenges without assistance. That is one of our headline concerns.

There is a bigger question about the tenor of the other changes. That is about mechanisms that the court has controlled and, in some circumstances, divined to ensure that public interest litigation, exactly those kinds of cases, can proceed when there are existing financial barriers to them going ahead. We do not have a particular problem with the proposals being codified, but they would tie the hands of the judges and attempt to put that public interest in the hands of Ministers. We think that Parliament should be exceptionally wary of that.

Martha Spurrier: I would add a short point, as I think most of them have been covered. Be wary of anyone who suggests that these are superficial changes. Just one example indicates that the changes in the Bill are unprecedented and far reaching, and that is granting the power to the Executive to define what is in the public interest. Anyone who has ever been involved in any litigation, or probably any political debate, will know that public interest is entirely in the eye of the beholder. Judges are there to listen to arguments, usually from a claimant saying, "In my view, this is in the public interest," and from a defendant saying, "In our view it is not." Judges then make a decision, independent of both the public body and the claimant. To suggest that the Executive should be able to weigh in and define the public interest, thereby binding the courts in litigation to which it may be a party, is a wholly unprecedented step for any piece of legislation.

Q233 Mr Slaughter: You talked about the constitutional implications. In practical terms, yours are organisations that are regularly involved in judicial review processes. Is this going to make a major or minor change on a day-to-day, week-to-week basis to the way that you function? How do you see that, by reference either to individual cases or to work load?

Martha Spurrier: It will make a fundamental difference to the way that the Public Law Project and others act on a day-to-day basis. There are a number of reasons why. The first relates to interventions.

The Public Law Project has in the past intervened in cases; it has also been a litigant in cases where other independent organisations have intervened. The current position is that an intervener will be allowed to participate in proceedings only with the permission of the court. It will bear its own costs but it will not be liable for other parties' costs because it is solely there to assist the court and not to descend into the arena of the arguments between the litigants. Every single intervention the Public Law Project has made has been on that basis. Without giving away the Public Law Project's financial position, I can say with absolute certainty that its trustees would not give permission for applications for interventions to be made if there were a risk, which is currently unquantifiable, of getting hit with the costs of that intervention from both parties, including the losing party.

The other issue relates to protective costs orders. The Public Law Project has taken cases in its own name, as a litigant itself. It is not a charity of significant means, as is the case for most charities, although there may be some exceptions. The Public Law Project is certainly not of significant means and it cannot afford the risk of an adverse costs order if it loses litigation, regardless of how important that piece of litigation is. The proposals on PCOs will do two things. First, they will not be available pre-permission. Once again, our trustees would not allow us to proceed with a case if we could not have any guarantee that we would have cost protection going forward. We simply would not be able to proceed with that case.

Lest that sound as though the Public Law Project is cherry-picking good cases that it wants to put its name to, it should be absolutely clear that the criteria for granting a PCO are that if it was not there, the case would not be brought, and that it is in the public interest for the case to be brought. There is no one else in the right place to bring the case, and it is in the public interest, but it simply cannot be brought because the cost disincentives prevent the Public Law Project from even making the application in the first place. There are many other issues, but those are the two ways in principle that it would affect PLP's work.

Sara Ogilvie: Liberty has a legal department; we represented clients in 40 cases last year, we brought five judicial reviews as part of that and we also made three interventions. The intervention issue is one that it is probably worth speaking about. It is a small but significant part of our work. It is important and we particularly think it matters.

The case of Marper was conducted a couple of years ago, and was about the retention of DNA samples. It went all the way to the European Court of Human Rights, where the Government eventually lost. That loss resulted in the coalition Government changing their policy when they came into government, so it is a significant case.

We wanted to intervene at the Court of Appeal stage, but chose not to do so because Treasury solicitors threatened us with a costs order if we did—that was just with the threat of costs, not, as the Bill would have, almost absolute certainty that the costs would be ordered. We took the decision at that time that we could not make our intervention. The case proceeded and we ultimately made an intervention at higher levels of the court work. The judgment on the case said that it was our intervention that made the difference because it brought the point that the case eventually turned upon; no one else had raised it at any other point in the process. We would not have been able to do that with the threat or guarantee of costs hanging over us.

Angela Patrick: I would like to take us back so that it is not just about our three organisations. Andy—sorry, Mr Slaughter—you asked us to talk about what impact it would have on Justice, Liberty or PLP, but I am sure that there are Committee members who have sat as charity trustees or as members of boards of not-for-profit organisations. Think about local community groups—I am sure you have all been there and seen them. They operate on a shoestring, and that is true of more than community groups. You will quite often find that national charities operate at a deficit—their accounts are public, so you will be able to look at them. Also, it is not just our three organisations that bring interventions in the public interest. Organisations such as Mind, the Child Poverty Action Group and others work to assist the courts in cases where they think they can bring something of value, to ensure that the law develops in a way that is not inadvertently damaging to the wider public interest.

Now, imagine you are sitting on your board and having a meeting, and I come along as your lawyer and say, "We have an exceptionally important case that we think will affect every single one of our members nationwide. The problem is I have to give you the advice that, on the rules in this Bill, we are subject to an unascertainable costs risk, which is actually a more significant costs risk than if we were bringing the litigation ourselves, because unless we can show exceptional circumstances"—that is a high test—"we will be unavoidably required to meet an order against us that the court is mandated to make for the costs of both parties, regardless of whether the party wins or loses, because we have made an intervention."

You can imagine your next question might be, "What are those costs?" I am limited in my ability there because Justice does not actually take cases, so we do not often see Treasury solicitors' bills or invoices. But I can imagine that, although a Treasury solicitor's rates are quite reasonable and set to reflect the fact that they are a public service, they contract out litigation. Counsel representing responding authorities will charge at a reasonable commercial rate. I would not like to guess what James Eadie, as Treasury counsel, charges. I am sure that it is very reasonable. He is an exceptional counsel and he works very hard, but if you were on that charity board and faced that potential cost risk, knowing that your organisation operates at a deficit, I would predict that pretty much every single board member will say, "I am very sorry, but we can invest our resources much better elsewhere."

Q234 Mr Slaughter: Just on that specific point, you mentioned exceptional circumstances. Are you saying that that does not give you sufficient comfort that, in appropriate cases, the judge would order that the normal rules in relation to interveners do not apply?

Angela Patrick: I am putting it to you: would it give you comfort if you were sitting on that charity board? I am usually advising charity boards, not sitting on them, but I can guess that my reaction would be no—not least because it is a complete reversal of the current position and one that, from our perspective, is unjustified and based on a complete misunderstanding of the point of an intervener. If you do not mind, may I elaborate on our view of what an intervener's purpose is?

Mr Slaughter: That would be helpful.

Angela Patrick: Justice is one of the most frequent interveners before our senior courts. We have written a book about that, which is called "To Assist the Court." I ask Members to keep that in their mind. To assist the court is the only point in taking an intervention.

Public interest interveners, in the main, are the sole bunch of interveners who get their way into our courts. It is extremely rare for any individual who has a sole or individual or direct interest to be called an intervener; they are more likely to be called an interested party and join the proceedings and be subject to ordinary costs rules.

I want to make this clear: if you are an intervener, you do not choose to intervene. You do not stroll in through the front door of the court, plonk yourself down and say, "I am going to tell you what I have got to say." You ask the court politely, "Can I come in?" In every case, every intervener is invited to intervene. They offer their assistance to the court and the court determines, in every case, whether what they have to offer is valuable. If it is of value to the court, you are invited in. You are only ever invited in on the terms set by the individual court; you are there but for the grace of the judge who controls the litigation.

The judge can say, "Ms Patrick, I think you are acting in the public interest, but, of these 20 points you want to make, I am interested in only two of them and, in fact, I want only five pages." If that is all we are allowed to do, that is fine, and that is all that we will do. It is entirely at the grace of the judge, which is why the costs rules are different.

The Lord Chancellor talks about the motivation for the changes being to ensure that each person participating in litigation meets a proportionate financial burden. We are slightly confused, as we meet the financial burden of our intervention. We know that we will not recover our costs.

Justice is a charity. At the minute, we are sitting as an intervener in the Supreme Court in a case about miscarriages of justice, because that is a big part of our historical work. My colleague is sitting there all day, and we meet the costs of her salary. We worked out that, in an average intervention, you probably have a director-level lawyer—we have only two—who devotes about 20 days of their annual resource to an individual intervention. We take that hit, because we think that we have something of value, in the public interest, to put before the court to ensure that a case does not set bad precedent and that the court's decision takes into account the wider impact of its determination, perhaps outside the submissions being made by the parties. We do it only in cases where the court lets us in. The court opens the door, and it decides how far. That is why the costs rules are different.

This would not be just a minor change; it would completely reverse the current position on costs. At the minute, there is a presumption against. The court retains discretion, and if you behave unreasonably, or step into the shoes of the party, or do something that is outside the bounds of your permission, it will make a costs order against you. You know that you operate at risk, and it makes you behave well. That presumption will be completely reversed, and in all cases, except in exceptional circumstances, a costs order must be made. It is mandatory, except in those rare exceptional circumstances. The costs order will be sought not only by one party, but by any party that might seek to recover. That, I think, is a seismic shift for boards to take on board, whether it be at a charity level or for a not-for-profit.

I want to leave one message with you. Some people have said that this will kill intervention. It will not kill intervention, but it will kill intervention by organisations that are acting to expend rare resources that they do not really have. It will not stop organisations that have massive amounts of money. It will not stop Government Departments, which often intervene. It will not stop public agencies, and it definitely will not stop corporations, where they think that they have an interest that needs to be represented. It will stop organisations such as ours that devote limited resources to ensuring that the public interest is represented in cases where the courts might be too narrowly focused on the interests of the parties before them.

Q235 Mr Slaughter: Final question. It is put against that that the Executive, with the consent of Parliament, has the right to change the rules governing judicial review, not least because public money may be involved. It is also pointed out that the numbers of judicial reviews have increased, particularly over the past 10 years. What would you say to that?

Angela Patrick: As I have already said, it is perfectly open to the Executive to seek to change the rules, but it is for Parliament to be on guard against the rules being changed in a way that allows the Executive to shift the rules unfairly or to create barriers that will ensure that judicial review is for ever an unequal remedy, open only to those who have got cash to bring the cases to call Government to account.

On the figures, we have provided detailed evidence of why we think that the figures are unreliable. We can come back to the questions about detail, if you want to go into it some more. My concern is that a lot of the figures reference immigration cases, which are now being shifted out of the administrative court in any event, so they will not really be affected by the changes. The costs on the administrative court will shift. If you look at them in detail, the numbers of ordinary judicial reviews have generally remained static. That is our headline on the figures.

We want to keep coming back to the fact that, clearly, it is open to the Government to seek change, but it is for Parliament and individual parliamentarians to put them to proof—that is a very lawyerly term, sorry—or to exercise close scrutiny of the arguments that are being

made that the changes are not damaging. These are constitutionally significant remedies, and we say that they are remedies that need to remain open to all.

The Chair: We are halfway through, and we have only had one questioner. I have two more people indicating that they want to ask questions, so we need to speed up the questions and answers a little bit.

Q236 Valerie Vaz (Walsall South) (Lab): All of you, as practitioners of judicial review, have attended cases and you know the grounds for judicial review: illegality, unreasonableness or breaches of procedural rules. How important do you think those grounds for judicial review, and cases on judicial review, are for the rule of law?

Martha Spurrier: I do not think their importance can be overstated. Judicial review is very simple. It is simply about governing the relationship between the citizen and the state. It is about saying to the state, "You may act, but you may only act lawfully." All those grounds that you have just listed are directed at saying to any public body, be it a hospital, a local authority or a Government Department, "You have overstepped the four corners of your power, and in doing so you have acted unlawfully. You have infringed the rights of a private citizen." It is obvious. I am not going to make crass analogies about history, but it is obvious why anyone, whatever their political persuasion, would think it was very important for Governments and public bodies of all colours to be kept within their lawful authority.

On the procedural irregularity ground, because that is obviously what is being suggested should be reformed by the Bill, there are two points to be made, and they can be made briefly. First, any underestimate of the importance of fair process is naive and superficial. It is plainly important for good administration and public confidence in good administration for public authorities to act lawfully. I do not think that needs further elaboration.

Secondly, the way the Bill is drafted is such that if it is highly likely—not inevitable, but highly likely—that the outcome would have been the same, you will not have a remedy in judicial review. That includes situations where you could prove beyond doubt that a public official had acted, for example, dishonestly. You could have a situation in which a magistrate was bribed to issue a warrant when there was no question that he or she had been bribed to issue that warrant and lawful grounds for issuing the warrant existed, so if he or she had done things lawfully, the warrant could have been issued, but the courts will not be able to intervene even to make a declaration that that was an unlawful act by a public official. This catches even dishonest abuse of power by public officials and that is plainly wrong.

It is also plainly wrong to say that when you have a process and cannot say for certain that the outcome would have been the same, it is entirely self-serving for a defendant to any judicial review to turn up and say, "Well, I can assure you that, had we acted lawfully, we would definitely have come to the same decision." That is a self-serving proposition to make and it is clearly designed to subvert the authority of the court in scrutinising due process and natural justice.

Angela Patrick: You may hear from a number of much more senior practitioners than us this afternoon, and I suggest you talk to Mike Fordham and Martin Westgate. I have not practised for some time, but I have worked in Parliament for quite a long time. I will try to illustrate how important judicial review and each of the grounds you have mentioned are. You are all MPs and you have been here for a while.

Mike Kane (Wythenshawe and Sale East) (Lab): I have not.

Angela Patrick: Can you remember how many times you have asked a Minister whether a Bill needs another safeguard and the answer has been, "Don't worry. We've got judicial review."? I am sure that officials in every Department love that line and ministerial briefs must have included the words, "Don't worry. We've got judicial review," more times than you can mention. Our problem is that this package will mean that not only all the promises that have gone before, but all the promises to come, such as, "Don't worry. We've got judicial review," will become a lot less realistic. It will become, "Don't worry. There's judicial review for those who can afford it and can get over the financial burdens."

We are really worried that what will happen if you look at the "highly likely" test, for example, is that it looks like a procedural tinkering exercise. Changing from "inevitable" to "highly likely" and bringing forward, when you think about it, sounds very dull, but if you look at what it requires the judge to do, it is a very different exercise.

What does "highly likely" really mean? It means that a local authority will show up in the first instance when something comes before a judge and say, "Don't worry. It's highly likely this wouldn't make a substantial difference." If you are a judge, what does that require you to do? What does it require you to ask yourself? If it is about consultation and you have a constituent who wanted the local authority to have consulted, and Parliament has said it should consult, but it has not, and the constituent asks whether it would be the "highly likely", what should the judge ask? What would have been in the consultation document had it consulted? Who would have responded to the consultation document? Would this individual applicant before the court have responded? What would he have said? How would the individual local authority have responded to what was said during the consultation?

Those exercises would require the judge to act as if they had been the decision maker. We are being told from all corners, political colours aside, that that is simply not for judges to do. I am a lawyer, but it has been a while since I was in practice, and that is not the point of judicial review. Judicial review sees the judge as the referee, saying, "Did you get it right? Did you apply the rules properly?" What this would do is to ask the judge to take off his hat for five minutes and think, "Hang on a minute. If I wasn't the referee and I was having to take this decision myself, and if I didn't tick all the boxes and I missed the last one, would I still have ended up with the right decision?"

Q237 Valerie Vaz: So you are saying that the judges are now getting involved in looking at the merits of the case, which they should not be doing and have never done?

Angela Patrick: Yes. They have never done that—it is constitutionally improper.

What we would like to say to Parliament is this: imagine all those pieces of legislation you have looked at that have a decision-making tree—all the rules and all the procedures you want an individual decision maker to follow. The question is: when the decision maker is looking at those rules, do you want them to ask, "Exactly how much wriggle room do I have here? If I get it slightly wrong, is judicial review going to work? Or am in the realms of possibility if I don't consult on this one? Will I get away with it?"

The Chair: Order. We have less than 20 minutes left. I have three people indicating that they want to ask questions. I think I will have to limit Members to no more than two questions, and I ask the witnesses to be brief in their answers.

Q238 Valerie Vaz: Okay. Can we just move on slightly? Could each of you just pick out some cases where there have been matters of public importance and public policy has changed? Could you also, just for the record, say—I know some of you have been out of practice—how long these commission hearings take and how long actual cases take? I know what my experience is: sometimes commercial hearings are very short, sometimes 15 minutes. We are not talking about huge lengthy cases that take up lots of court time. Could you just focus on the kind of cases that you have brought that affect public policy that you may not be able to bring in future?

Sara Ogilvie: First, I should say that I am afraid I am not a practitioner. I have never been a lawyer. I have always done policy; I have always been in Parliament, so I am afraid I cannot answer the second part of your question.

I know that time is brief, but I will just reiterate that Marper case. It was a case that changed policy in political parties. We discovered that the retention of samples of people's DNA was completely illegal, and without the process of judicial review, we would not have been able to do that at all.

Angela Patrick: We will write to the Committee with examples of procedural cases that have made a difference in public policy.

Valerie Vaz: Thank you.

Martha Spurrier: I will give just two examples. There are so many; I am sure that afterwards I will kick myself for not having thought of different ones—

Valerie Vaz: You could write in.

Martha Spurrier: Yes. A brief example I can give now is a case where judgment will be handed down next week in the Supreme Court, and it concerns people in care homes who are severely learning disabled; they do not have capacity. And the question is this: in what circumstances are those people so restricted in those care homes that additional safeguards need to be in place to protect them? That question has been litigated all the way up to the Supreme Court. Whatever way the judges go, it will have huge implications for anyone with a relative or a disabled child in any kind of social care home in this country. It was brought by legally aided individuals, who are represented by the Official Solicitor, and in the Supreme Court, there were interventions from a number of public interest organisations, including Mind, the Equality and Human Rights Commission, the National Autistic Society and the AIRE—Advice on Individual Rights in Europe—Centre, which were all invited by the Court to make short, restricted submissions on the implications of that appeal, and all with cost protection. That is one example, and we will provide more in writing.

Valerie Vaz: Thank you very much.

Q239 Stephen Metcalfe (South Basildon and East Thurrock) (Con): Good morning. I just want to get a bit of clarity about one of the examples you gave. If a public official had acted unlawfully—I think you suggested taking a bribe, or whatever—would that not be a criminal matter, so it would be referred to the police for investigation? It would not necessarily require a judicial review to sort that issue out.

Martha Spurrier: Well, there are two issues. There is a criminal offence of misconduct in a public office, but it will not always be made out: for example, where a police officer acts in a fashion that amounts to gross misconduct and is dismissed as a result, it is a separate question for the Crown Prosecution Service whether to charge that public official. Also, a criminal prosecution of someone who had acted criminally would be rare, so that is a high threshold—it is different from a situation in which there has been only improper practice.

Q240 Stephen Metcalfe: But you raised it as an example.

Martha Spurrier: Yes. The fact is that judicial review plays a role in that scenario because the effect of that unlawful action on the decision-making process needs to be looked at—ithe example I gave, the effect of the grant of the warrant where the magistrate has been bribed. No criminal prosecution of that magistrate could deal with that issue, because a criminal prosecution would have nothing to do with the recipient of the warrant.

Q241 Stephen Metcalfe: Right. Okay. I think I follow some of that. To return to the issue of cost and not intervening because of financial exposure, does that mean you think that there should be an unlimited call on the public purse in such matters? Is there no limit to what we could spend?

Angela Patrick: There is a limit—that is what I was trying to bring us back to. We should not operate with blinkers on about how things work now. It is the judge who sets the limit. If the judge wants only 20 pages, he says, "We'll have only 20 pages from you. I think that you can helpfully say everything you have to say in 20 pages. Do not give us any more." If the judge thinks that what you have to say is useful, that is where they set the limit. The judge says, "This is where the public interest lies and this is how much we want from you—full stop." There are limits. We are not arguing for unlimited freedom to say what we like or influence the litigation. There is a long line of case law that shows that where you act unreasonably, the judge holds the power to hold you liable for costs, and they do so.

Q242 Stephen Metcalfe: Will it not still be the case that they will ask you for a limited amount of input? You will therefore know what your financial exposure is and be able to calculate it.

Martha Spurrier: It is impossible to calculate the financial exposure. There are two problems. First, I return to the point made earlier: show us the evidence that interventions are placing an improper call on the public purse. No evidence has been provided of a single intervention that has done that, so we do not understand the problem that the measure is directed at. That is the basic point.

Secondly, you currently get a limited rein in the court when intervening, but because you will not be liable for the other party's cost, you can say, "We can work out how much it will cost us to intervene." In the new world under the Bill, the more helpful your intervention, the most cost you will incur, arguably. It might be that the other parties need to spend five or 10 hours poring over your materials and thinking about the implications. You will then be liable for those five or 10 hours.

Q243 Stephen Metcalfe: But who should pay that cost?

Martha Spurrier: Currently, that cost is split—it is carried by both parties equally because the court recognises that it assists them and is proportionate, which is why the court limits it. That proportionality assessment is inherent in every single intervention decision a judge makes. The judge might say, "It is disproportionate for you to get involved—it would be too great a cost burden on the parties and the court, so do not get involved," or the judge may say, "It is proportionate for you to do an hour, so you can get involved."

The fact is that one, two or three hours might not seem like a great deal of time, but when you are talking about probably two lawyers on each side, it racks up thousands and thousands of pounds of costs, which would be prohibitive for an intervener.

Q244 Stephen Metcalfe: But presumably the parties you are intervening on will bear that cost, and it could be that they cannot afford it.

Angela Patrick: Can we come back to something Martha and I have said already about recognising what the point of an intervention is? The court is the gatekeeper, and is going to invite you in only if it thinks it is in the public interest in the particular case. Remember that interventions are rare. They are often in constitutionally important cases that are being litigated and are going to have a much wider public impact than that on the individual parties before the court. Most interveners will intervene to talk about the bigger picture, and judges will let you in because they think that there is merit in them hearing about the bigger picture and being asked questions about it, and in parties rising to the challenge. It is that public interest that calls the judge to open the doors and that currently justifies the shift in the costs rules.

Q245 Stephen Metcalfe: One final question: why do you think there has been a threefold increase in the number of JRs in the past 12 years? Presumably, that has cost implications as well. Has the gatekeeper worked?

Martha Spurrier: Perhaps I can step in here. We will provide this analysis in detail in writing. It is simply not right that there has been that threefold increase in non-asylum immigration judicial reviews. The Public Law Project has done extensive independent research on the increase of judicial reviews, which was cited in the Government's latest consultation. I will not go into the detail, but I will give one example. During the course of the consultation, the Ministry of Justice held a webchat, in which it was stated that non-asylum immigration judicial reviews had increased by 27%, from 2,300 in 2007 to 3,000 in 2012. The Public Law Project did an analysis of every single judicial review that had been issued in 2012, which was 12,434, and realised that there were almost 1,000 fewer cases than the MOJ spokesperson had said.

As I say, I will not go into the nitty-gritty, but we simply do not accept that there has been that threefold increase. Independent research shows that the number of judicial reviews—when you remove asylum and immigration, which has now been taken out of the administrative court—has remained static for the past 10 years.

Angela Patrick: Can I come back to the question about taxpayers' burdens and judicial review? I have two brief points. First, we have not talked about the judicial reviews that save the taxpayer money. A lot of people did so in the consultation, but that was not addressed by the Government's response. One of the examples given in the Government's first consultation document was the Pergau Dam case, which was brought by environmental charities that were talking about trying to save the taxpayer hundreds of millions of pounds that they thought should not be spent inappropriately. We can talk about other examples, and they were there in the consultation.

Secondly, if this is about saving money, there are ways to make efficiencies in the administrative court, but to do so in a balanced way. One example, which has been outlined among many in the Bingham Centre's really helpful review on streamlining judicial review on the administrative court—you are going to see Mike Fordham, who wrote the report, this afternoon so you can ask him—is about costs and respondents. It is currently really difficult to get costs in the administrative court, even if you win against a public authority on, for example, a permission stage, but what about the circumstances when a local authority or a public agency pursues that hopeless defence, racking up unnecessary costs for the taxpayer, or resists permission and requires a hearing in a case where it is pretty obvious that there is an arguable case to be answered? Why have that hearing if it is unnecessary? If it is unnecessary, should there not be a deterrent by showing that costs should be recoverable against respondents when they run unwinnable points? Make that argument equal and balanced, and we will see that there is a genuine engagement with making judicial review more efficient and less costly.

Q246 Mike Kane: In 1485 Richard III, who was the last English king to die in battle, fell at the field of Bosworth, defeated by Henry Tudor and the Stanley brothers. Being from my side of the Pennines, I was delighted at the outcome. His remains were found in a car park in Leicester not so long ago, and they were dug up, examined and eventually interred in Leicester cathedral by Leicester university.

Mr David Evennett (Bexleyheath and Crayford) (Con): Not yet.

Mike Kane: Near enough. The Plantagenet Alliance has taken out a judicial review to look into Leicester university's claim that it had the power to do that. Do you not think that that is a colossal waste of taxpayers' money and an abuse of the judicial review system?

Angela Patrick: My husband is from York, so I do not want to restart the wars of the roses.

Mike Kane: That is just between me and my hon. Friend the hon. Member for Barnsley Central.

Angela Patrick: Then I think it has already been taken care of. The real question is: what hurdles did they have to get over to get themselves into court? You have got a judge who sat there and said, "They have got an arguable case." They are applying the rules of judicial review and they have got a runner. We have looked at this, and the Government have changed the test more recently. If a case is totally without merit, it is entirely there for a judge to say, "I'm really sorry, you are on a hiding to nothing, get lost. We are not even going to have an oral hearing."

There must be something in that case that has prompted the judge to ask, "Have they abided by the rules?" That is the real question. Have the decision makers who have determined where the remains lie done it properly? We can apply that to all sorts of decisions. We think that is such a valuable exercise it should not be tinkered with lightly.

Martha Spurrier: I do not think it can be suggested that there is anything in part 4 of the Bill that would have knocked out that challenge. I am not instructed in that case. I am not going to make any comment about the validity of their legal arguments, whether they have them or not; that is for the judge to decide, it is certainly not for politicians to decide. I would ask you to point me to the relevant clause in the Bill. If that is a mischievous use of judicial review, where in the Bill will that be stopped?

Q247 Mr Evennett: Do you think it is a misuse?

Martha Spurrier: I cannot comment on it. I have not read the papers and I do not know the arguments.

Robert Neill (Bromley and Chislehurst) (Con): A lawyerly response.

Martha Spurrier: It would be entirely improper for me to weigh in.

Angie Bray (Ealing Central and Acton) (Con): You seem to have a view on every other thing. This would be something that it would be interesting to have a view on.

Martha Spurrier: It would be entirely improper for me to comment on something that I had not read the papers for.

Angela Patrick: I do not know about Sara's position, but we are both professionals who are subject to Bar code of conduct. We would not want to comment on cases that are actively being considered by judges, except in the abstract.

Martha Spurrier: I can comment on cases that I have brought and been involved in, because I know about those cases. It is improper for me to do so on anybody else's case or work.

The Chair: At this point I am going to bring in Dan Jarvis from Barnsley.

Q248 Dan Jarvis (Barnsley Central) (Lab): My question is for Ms Patrick, but I would be interested to hear if other members of the panel have a view. I would like to take you to part 2 of the Bill, the part that deals with restraint. You will know that the Bill includes the power to use reasonable force under certain circumstances. When do you think force can or should be used? Do you think that should include enforcing good order and discipline in the secure college?

Angela Patrick: The answer to the second question is definitely not. You should not take Justice's word for it; you should take that of the Joint Committee on Human Rights. It was asked that question in the context of previous statutory instruments that were introduced to deal with the use of force in secure training centres. The JCHR conducted two inquiries on that issue and was asked to consider what the rights are of mostly vulnerable children who are held in those closed circumstances. Their rights have to be that force is used against them only as a last resort, when it is proportionate and absolutely necessary to protect staff or other children from harm.

It looked at the context of our international obligations: the UN convention on the rights of the child, the Human Rights Act and the European convention on human rights. It came to the conclusion that it could not see the circumstances when justifiably permitting the use of force only for good order and discipline could be deemed proportionate. That was backed up in litigation before the High Court, which came to a similar conclusion.

Dan Jarvis: Okay, thank you.

Sara Ogilvie: If I could add to what Angela said. We have heard from the Government that our concerns about this are just based on a misunderstanding and that rules will come into force to ensure force is not used for the purpose of enforcing order and discipline. I would like to say that before the cases and reviews that Angela mentioned, there was a similar sort of provision and a similar sort of confusion, and that led to cases where force was used and children died as a result. We urge those present here to take that on board, and bear in mind that if we create any sort of confusion we could go back to a situation that clearly nobody wants to happen.

Q249 Dan Jarvis: I have one very quick question about electronic monitoring. Does anybody have a general view on the parts of the Bill that relate to electronic monitoring?

Sara Ogilvie: Yes, we would say that the changes that the Bill would bring about to electronic monitoring will mean that tags will be able to be put on people not attached to a condition to ensure that they adhere to a curfew, but just to check the location and whereabouts of that individual. We have liberty concerns about that and privacy concerns. Given what we have seen with the way that G4S has dealt with tagging in recent months, we really do not have confidence that we can place our rights in its hands in this context.

Angela Patrick: Our concerns are the same. These powers exist. If the judge wants to tag you because it is valuable to attach that tag to a condition—

The Chair: Order. I am afraid that brings us to the end of the time allotted to ask questions of these witnesses. May I thank them on behalf of the Committee for their evidence this morning?

Examination of Witnesses

David Austin and Murray Perkins gave evidence.

12.30 pm

Q250 The Chair: Could the witnesses introduce themselves for the record?

David Austin: My name is David Austin. I am the assistant director at the British Board of Film Classification, responsible for policy and public affairs. The BBFC is the UK's independent regulator of film and video content. We operate online and offline. Our interest in clause 16 is whether it will have any impact on our classification of sexually violent and abusive pornography, particularly as we are under a legal obligation under the Video Recordings Act 1984 not to classify any content that is illegal.

Murray Perkins: I am Murray Perkins. I am a senior examiner at the BBFC. I have responsibility for day-to-day classification of pornographic works and a particular expertise in those pornographic submissions.

Q251 Dan Jarvis: Do you think there are examples of sexually violent material that would not be captured by the Bill as drafted?

David Austin: Yes, there are examples of sexually violent material that are not caught by the Bill. There are a number of areas of violent and abusive pornography that are not caught. It might help if I list one or two of those areas.

Clause 16 clearly talks in terms of realistic and explicit depiction of rape in pornography. We deal with quite a large number of pornographic works every year and have done for many years. Some of these feature clearly fictional depictions of rape and other sexual violence in which participants are clearly actors, acting to a script. These works may include scenes of relentless aggressive abuse, threats of physical violence with weapons and forced acts of sex. Depending on how realism is interpreted in future—certainly it has been interpreted very narrowly in the past, but I understand that the Government will amend some of the explanatory notes to the Bill on realism—that may change.

Another area where we cut porn on harm grounds under the Video Recordings Act relates to abduction scenarios where individuals are shown bound, kidnapped, struggling with bonds, and whimpering—shown as victims restrained against their will with no other context. We also cut grooming scenarios which feature the grooming of individuals portrayed as youthful, sometimes youthful and vulnerable—sometimes they may have the appearance of children, although they are not children but adults—by characters in dominant roles. Animation is another area which we cut. There is a Japanese genre called hentai which is a pornographic genre which features things like incest, underage sex and forced sex. They may be realistically animated but you could argue that they are not realistic in the terms of the Bill. The fact that animated images can be harmful is already accepted by Parliament in the Coroners and Justice Act where pseudo images of children in sexual abuse situations are illegal.

The final area relates to explicit rather than realistic. We remove from pornographic works sexually violent content that in our view is harmful, where, for example, you cannot see the explicit act of penetration but the viewer is led to believe that this is a rape scenario, albeit acted. We remove that content.

Q252 Dan Jarvis: Do you think there would be merit in explicitly referring in the Bill to those extreme types of pornography?

David Austin: One of the things that we need to bear in mind in relation to this Bill is that although clause 16 is tightly defined, the offence is one of possession, and when we cut in the physical world, on a physical DVD, the offence is one of supply. The Bill is part of a wider approach to aligning protections online and protections offline. We understand that, following a consultation by the Department for Culture, Media and Sport published in July 2013, the Government will bring forward legislation to deal with exactly the kind of content that I have just described to make this content illegal on UK video-on-demand platforms. That will align our standards on harm, which are based on research, with the standards applied by Atvod, the Authority for Television on Demand, which is the UK regulator of UK-hosted video on demand. That legislation would cover UK-hosted content that I have just described.

Q253 Sarah Champion (Rotherham) (Lab): Mr Austin, you mentioned as a throwaway that child abuse and child grooming were covered under other legislation. Could you expand a little on that? Is it strong enough as it stands?

David Austin: It was in reference to animation. We have not seen the updated explanatory notes on the Bill—I do not know whether they have been published yet. The notes that we have seen do not talk about animated content. It is possible to argue—I do not know how the courts will interpret it—that animation is not realistic, even though it is getting more and more realistic all the time with computer-generated imagery. CGI images of children and animated images of children in sexual abuse situations are illegal under the Coroners and Justice Act 2009, so that would take care of animated depictions of child abuse, but it does not take care of animated depictions of rape of adults, for example.

Q254 Sarah Champion: But are animated or real films of child abuse and child grooming covered under current legislation?

David Austin: That is covered in other legislation, yes.

The Chair: As there are no further questions from Members, on behalf of the Committee I thank the witnesses for their evidence.

Ordered, That further consideration be now adjourned. *—(Mr Vara.)*

12.38 pm

Adjourned till this day at Two o'clock.