ILPA Briefing for the Criminal Justice and Courts Bill
Ping Pong House of Lords Wednesday 21 January 2014
Judicial Review

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At the last stage of Ping Pong, in the House of Commons on 12 December 2014 the House rejected both the Lords' amendments on judicial review, in a single vote, and accepted the Government's amendments in lieu. The Government's majority decreased and in numerical terms support for its proposals was down and opposition to them was up. The vote on Clause 64, the test for the courts refusing judicial review at the first Commons' consideration of Lords amendments had been 319: 203 and on Clause 65, the questioning of funding, 315: 203; this time the vote was 301: 227. The Commons agreed a carry-over motion, recognising that the Lords might insist again on its amendments and making provision in the timetable for this. There is every reason for the Lords to do so as the Government's compromises fail to address the gravamen of the objections to the Bill.

It is as much a part of the constitutional settlement that judges judge as that parliament passes laws. Both clauses are concerned far less with what will happen than with who decides what will happen. Parliament is being asked to approve provisions that would discourage citizens from taking their cases to law and, where they do prevent judges, apprised of the facts of those cases and the arguments proffered, determining how they should be dealt with.

The government cannot be insulated 100% from the irritation of unmeritorious challenges without too high a price being paid for this. On 25 June 2014 the President of the Supreme Court, Lord Neuberger of Abbotsbury, told the House of Lords Committee on the Constitution:

> *…inevitably that there will be some applications that are unmeritorious but nonetheless get pursued and hold things up. But provided it does not get out of hand—I have no reason to think that it has got out of hand—it is a small price to pay for a healthy judicial review system.*[1]

In the ensuing nearly seven months, the Government has not brought forward evidence that things have got out of hand. There were reminders of this when the Bill was before the Lords at the last stage of Ping Pong. Then, the Lord Faulks confirmed in response to a

[1] Unrevised transcript of evidence given to the Constitution Committee on 25 June 2014, Q4.

question from the Lord Philips of Sudbury that he had no data as to the extent of any abuse.[2] The Lord Lester of Herne Hill reminded the House that "the Joint Committee on Human Rights…has repeatedly pointed out that the Government have produced no evidence…"[3]

CLAUSE 64

Lord Amendment 102B
Lord Faulks to move, That this House do not insist on its Amendment 102B and do agree with the Commons in their Amendments 102C to 102M.

Lords' amendment 102B provided that the court "may", instead of the Bill's original "must", refuse judicial review if the court concludes that it is "highly likely" (the test currently on the face of the Bill) that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. The court would have retained discretion to decide whether to refuse the judicial review, but on the basis of the highly likely test. The Commons rejected this and accepted the Government's amendment in lieu, to allow the courts to retain a modicum of discretion to hear the judicial review but limited to circumstances where this is "for reasons of exceptional public interest".

Debates in the Lords at the previous Lords' stage of Ping Pong had criticised the Lord Chancellor for having misled the Commons into thinking that there was an ""exceptional circumstances" exception to the courts' obligation not to hear the judicial review,[4] a mistake for which the Lord Chancellor has apologised. But the Commons amendments do not provide the exception that the Lord Chancellor had said was already there. They do not instate an "exceptional circumstances" test. Instead, "public interest" and "exceptional circumstances" have been elided to produce an "exceptional public interest" test.

MPs queried what the exceptional public interest test means. Mr Geoffrey Cox said "I am not quite certain..."[5] Sir Edward Garnier was more direct, calling "exceptional public interest" "a moderately nonsensical expression…" [6]

The queries did not receive a clear reply. The Lord Chancellor told Mr Cox

> *It will be a matter for the judges to decide how and when that test should apply. … I do not think it is unreasonable for this place to say that it wants a test that is a bar higher than the conventional public interest test and that this should be used only in exceptional circumstances.*[7]

But that describes a public interest test to be used exceptionally, not a test of "exceptional public interest." Pressed for concrete examples that might aid understanding, the Lord Chancellor spoke in generalities that did not permit cases to be identified,[8] although it would have been perfectly proper to cite cases, for judicial reviews are heard in public.

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[2] HL Report 9 Dec 2014: col 1739.
[3] *Ibid*., 1751.
[4] *Ibid*., cols 1741-2 per Lord Pannick citing the Lord Chancellor at HC Report 11 December 2014 col 82.
[5] HC Report, 13 January 2015, col 811, see also Mr Andy Slaughter MP at 815.
[6] *Ibid*., col 820.
[7] *Ibid*., col 811.
[8] HC Report, 13 January 2015, cols 811-812.

Despite his apology for having misled the House of Commons at the previous stage of Ping Pong, the Lord Chancellor did not appear to be above muddying the waters as to what his amendment meant:

> *We are trying to ensure that where a judicial review concerns a slight error—so slight that it is highly unlikely to have made a difference to the applicant and where the decision would have been the same regardless of that procedural defect—it will be deemed not to be a good use of court time for that judicial review to continue.*[9]

But the exceptional public interest test would result in the court's being obliged not to hear judicial reviews that contain very much more than a "slight error".

To put the proposed "exceptional public interest" test in context, the test for "second appeals" to the Court of Appeal is set out in the Civil Procedure Rules

> ***52.13***
> *(1) Permission is required from the Court of Appeal for any appeal to that court from a decision of the County Court or the High Court which was itself made on appeal.*
> *(2) The Court of Appeal will not give permission unless it considers that–*
> *(a) the appeal would raise an important point of principle or practice; or*
> *(b) there is some other compelling reason for the Court of Appeal to hear it.*

Permission to appeal to the Supreme Court is granted where, in the opinion of the justices, the application raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time.[10] Thus one can reach the highest court in the land without having to satisfy a test as onerous as that now proposed to bring a judicial review on matters of, for example, unfair and unlawful procedures.

The Lord Chancellor described the "core purpose of the provision" as being "to stop unnecessary, spurious, delaying-tactic, campaigning judicial reviews being brought on technicalities"[11] but did not explain why he considers that the courts are not both willing and able to do that in the vast majority of cases. One possible explanation that the Lord Chancellor takes a different view of a technicality than do the judges. As Lord Pannick said at the previous stage of ping pong:

> *… That a Lord Chancellor should regard the need for a fair procedure and legality as unimportant technicalities which should be excluded from judicial control is, to my mind, profoundly depressing and alarming.* (HL Report 9 Dec 2014: Column 1761)

In his attempts to explain "exceptional public interest" The Lord Chancellor settled for:

> *"It seems to me to be a simple proposition to say that a court must certify that a matter is of exceptional public interest —which might relate to a major, fundamental and worrying breach of procedure by a public body—rather than of general public interest.*"[12]

And thus we are back with Humpty Dumpty and the question of, 'which is to be master — that's all."[13]

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[9] *Ibid*., col 810.
[10] See Supreme Court, Practice Direction, para 3.3.3.
[11] HC Report, 13 January 2015, col 811.
[12] HC Report, 13 January 2015, col 819.
[13] Lewis Carroll, *Alice through the looking glass.*

CLAUSES 65 AND 66

Lords' amendments 103 to 106
Lord Faulks to move, That this House do not insist on its Amendments 103 to 106 and do agree with the Commons in their Amendments 106E and 106F.

The Commons rejected Lords' amendment 106D which would have allowed the court to have regard to the circumstances of the individual case and to retain the discretion to consider an application for judicial review even when third party financial information was not provided. The Commons accepted the Government's amendments in lieu which, as amendments 106B and 106C, had been rejected by the Lords, that the means of third party funders would only have to be disclosed if the financial support to be provided exceeds or is likely to exceed a sum set out in rules of court or in the Tribunal Procedure Rules. The Lord Chancellor indicated in the debates that the Government would consult on an appropriate threshold, taking as the starting point for the consultation a threshold of £1500.

That is only a figure for consultation, for as the Lord Faulks emphasised this when proposing his amendment which was rejected by the House of Lords:

> *I am sure that noble Lords will understand that we are not in a position to bind the hands of the procedural committees that will make the rules as to what the figure will be.*[14]

The Tribunal Procedure Rules, for example, are made by an independent committee but the rules it proposes can be allowed or disallowed by the Lord Chancellor (see e.g.).[15] The Lord Chancellor can only allow or disallow what the Committee might propose. Thus, as Mr Andy Slaughter MP said of the Lord Chancellor's undertaking to consult on a figure of £1,500, "That gives us little comfort."[16]

The Lord Chancellor told the Commons:

> *The debate in the other place was about how we could give comfort regarding the level at which the threshold will be set and how we will arrive at that number.* [17]

However, the Lords' debate was not just about the threshold; concern was expressed at those contributing "significant sums", certainly more than £1,500. Take, for example, the objection of the Lord Marks of Henley on Thames who said:

> *The Government's stated aim in these clauses, restated by my noble friend, has been limited to ensuring that wealthy people do not use impecunious applicants to pursue litigation as fronts, with no risk in costs to themselves. … That is an understandable aim, properly expressed by my noble friend, which no one could sensibly criticise. However, I remind your Lordships that the court already has the power to require information and make costs orders against non-parties in such circumstances….*

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[14] HL Report 9 Dec 2014: Column 1766. See also his comments at col 1773 and those of the Lord Mackay of Clashfern at col 1769.
[15] Tribunals Courts and Enforcement Act Schedule 5, paragraph 28(3), available at http://www.legislation.gov.uk/ukpga/2007/15/schedule/5 *(accessed 14 January 2015)
[16] HC Report 13 Jan 2015: col 815.
[17] HC Report 13 Jan 2015: col 810.

> *I have made it clear to the Government that I would be prepared to support the amendment in lieu if there were a clear statement that genuine supporters in this category who provided significant funds but did not wish to control the litigation would be protected.*[18]

See also the comments of Lord Carlile of Berriew, Lord Berkeley of Knighton and Lord Thomas of Gresford.[19] The latter recalled

> "*..a proposal to opencast mine part of Gresford colliery at a time when there were about 260 bodies still buried in it as a result of the 1934 disaster. …Since the matter had not been properly advertised, we took it to judicial review. We could not, however, expect every member of the community to be involved, so a committee of about eight people was set up to instruct solicitors and counsel to appear on this judicial review. It is those eight people I am thinking about, who might be found liable for costs. I can tell your Lordships that even then—back in the 1970s or maybe the early 1980s—costs were a considerable issue for these people before becoming involved in this matter. The result was that the judicial review was successful.*
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> *The county council advertised properly and the villagers —the community—then made contributions to the consultation that took place. Although the decision to permit opencast mining went ahead, it was with very stringent conditions. … The fear of costs was something that might have deterred that successful action altogether.*[20]

A judge can do nothing if the case is not brought in the first place.

Pressing his amendment to the vote, the Lord Pannick acknowledged that "*the rule committee will no doubt be heavily influenced by what the Government say is the purpose of this*," but added

> *...In any event, there is also—as emphasised by the noble and learned Lord, Lord Brown of Eaton-under-Heywood—a vital need in these clauses to retain a degree of judicial discretion in this sensitive context. The Government wish to impose absolute duties again and I, in this context, as in the previous context of Clause 64, suggest that judicial discretion should be retained."*[21]

If the constraints that parliament succeeds in imposing on the government of the day through the legislative process, and they are few, are to be given effect, citizens must be able to try to hold the government to account through the courts and judges must be free to deal with their cases fairly. For those reasons, the House of Lords should insist upon its, very modest, amendments.

[18] HL Report 9 Dec 2014: Column 1766
[19] Column 1771-1772.
[20] *Ibid*., col 1772.
[21] Col 1776