ILPA Briefing for the Criminal Justice and Courts Bill
Ping Pong House of Commons 13 January 2015
Judicial Review

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups.

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At the last stage of Ping Pong, in the House of Lords on 9 December the vote on the Lords' amendment to Clause 67, which would have maintained the discretion of the courts to consider whether to order an intervener to pay the costs of a relevant party to the proceedings and vice versa by removing the limitation on the court to depart from ordering interveners pay parties' costs only in exceptional circumstances, was lost.

Two amendments were won and on both the Government has proposed concessions. ILPA does not consider that the concessions offer substantive protection and therefore urges the House of Commons to support the Lords' amendments.

Clause 64 – Lords' amendment 102B and Government proposed amendments (a) to (k) in lieu.

The House of Lords' amendment provides 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 will retain its discretion to decide whether to refuse the judicial review on the basis of the highly likely test. The amendment was carried with a majority of 69 votes in the Lords, an increase in the majority from the original vote.

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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 will retain its discretion to decide whether to refuse the judicial review on the basis of the highly likely test. The amendment was carried with a majority of 60 votes in the Lords, an increase in the majority from the original vote.

The Government's proposed compromise is to give the courts discretion to hear the judicial review but limited to circumstances where this is "for reasons of exceptional public interest".

The debates in the House of Lords highlighted that the House of Commons had been misled when discussing this amendment:

> "**Lord Pannick**…*There needs to be an element of judicial discretion. The absence of judicial discretion is not, to use the Minister's words, a fair balance. During the one-hour guillotine debate in the House of Commons on all three of these judicial review issues—they were taken together—a Conservative Member of the House of Commons, Mr Geoffrey Cox, said that he could not support the Government because this clause will mean,*
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> > *"that flagrant and absolutely unacceptable behaviour by the Executive could be condoned by saying, 'Well, it made no difference.' There are times when courts ought to mark a fundamental lack of due process".*
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> *I agree. More importantly, so did Mr Grayling. The Lord Chancellor intervened in the debate and said:*
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> > *"The 'exceptional circumstances' provisions would allow a judge to say, 'This is a flagrant case and must be heard'".—[Official Report, Commons, 1/12/14; col. 82.]*
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> *The Lord Chancellor made the same point at col. 72. That is precisely the defect of this clause. It contains no exceptional circumstances provision. It contains no power for the court to say, "This case must be heard". The clause imposes an absolute duty on the courts to dismiss cases where it is highly likely that the defect would have made no difference, however flagrant the legal error and however important the issue from the perspective of the public interest. Since the Lord Chancellor in the debate recognised the obvious need for a degree of discretion in this clause, it is incomprehensible to me why the Government are so determined that the clause must be enacted with no degree of judicial discretion.* (HL Report 9 December 20144: cols 1741-2)

Thus the Government amendment appears modelled on what the Lord Chancellor told the House of Commons was in place last time the Bill was before the House of Commons but it refers not to exceptional circumstances but to exceptional public interest. Exceptional circumstances are one thing' public interest is another. But "exceptional public interest"? Is it meaningful at all? Is it a test that can ever be satisfied? The House of Commons would be voting for less than it voted for at the last stage of ping pong if it accepted the Government's compromise. The Lord Deben declared

> "*The Government have not distinguished themselves … the Minister got wrong the only argument of any importance that he presented and then tried to uphold in this House the decision of the other House which would not have come about except with the exercise of*

the Whip. …we have to give the other House an opportunity to reverse the decision that it made when it was not in full possession of the facts. That is the first thing we have to do." (HL Report 9 December 2014 col 1747)

That is the opportunity before the House of Commons today. The Lord Pannick, moving the amendment said

> **Lord Pannick:** *My Lords, I am very grateful to the Minister. He has been put in a quite impossible position, not, I think, for the first time, and I sympathise with him.*
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> *There are two central points here. The Minister very fairly accepted that the Lord Chancellor inadvertently misled the House of Commons when it considered the amendment that was approved by your Lordships…. He wrongly suggested that there is an exceptional circumstances provision in this clause which confers discretion on the judge.*
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> *However, that is not all. … 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)

Clause 65 Lords' amendment 106D and Government proposed amendments (a) and (b) in lieu.

The House of Lords insisted on its amendment which would allow **t**he court to have may have regard to the circumstances of the individual case and retain the discretion to consider an application for judicial review even when third party financial information is not provided.

The Government's proposed concession is 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 Tribunal Procedure Rules are made by independent committees but the rules it proposes can be allowed or disallowed by the Lord Chancellor (see e.g. Tribunals Courts and Enforcement Act Schedule 5, paragraph 28(3)).[1] Thus parliament does not, and cannot have any control over the period set in Tribunals as the Lord Chancellor can only allow or disallow what the Committee might propose. 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.* (HL Report 9 Dec 2014: Column 1766)

The Lord Pannick explained

> *If the level is too low, it will inevitably deter people from contributing to judicial reviews brought in the public interest because of the risk that the contributor will have to pay the defendant's costs.* (HL Report 9 Dec 2014: Column 1766)

[1] http://www.legislation.gov.uk/ukpga/2007/15/schedule/5

Lord Marks of Henley on Thames 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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> *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. In the absence of such a statement, I feel obliged to support the Motion of the noble Lord, Lord Pannick, to insist on the Lords amendments.* (HL Report 9 Dec 2014: Column 1766)

To effect meaningful change to the Bill, rather than a simulacrum of a victory, the Lord's amendments should be supported and the Government compromises rejected.