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Public Bill Committee

JUDICIAL REVIEW AND COURTS BILL

Fifth Sitting

Tuesday 9 November 2021

(Morning)

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Saturday 13 November 2021

The Committee consisted of the following Members:

Chairs: Sir Mark Hendrick, † Andrew Rosindell

† Barker, Paula *(Liverpool, Wavertree)* (Lab)
† Cartlidge, James *(Parliamentary Under-Secretary of State for Justice)*
† Crawley, Angela *(Lanark and Hamilton East)* (SNP)
† Cunningham, Alex *(Stockton North)* (Lab)
† Daby, Janet *(Lewisham East)* (Lab)
† Fletcher, Nick *(Don Valley)* (Con)
† Hayes, Sir John *(South Holland and The Deepings)* (Con)
† Higginbotham, Antony *(Burnley)* (Con)
† Hunt, Tom *(Ipswich)* (Con)
† Johnson, Dr Caroline *(Sleaford and North Hykeham)* (Con)
† Longhi, Marco *(Dudley North)* (Con)
† McLaughlin, Anne *(Glasgow North East)* (SNP)
† Mann, Scott *(Lord Commissioner of Her Majesty's Treasury)*
† Marson, Julie *(Hertford and Stortford)* (Con)
† Moore, Damien *(Southport)* (Con)
† Slaughter, Andy *(Hammersmith)* (Lab)
† Twist, Liz *(Blaydon)* (Lab)

Huw Yardley, Seb Newman, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 9 November 2021

(Morning)

[Andrew Rosindell *in the Chair*]

Judicial Review and Courts Bill

9.25 am

The Chair: Welcome to this morning's sitting. I ask that everyone continue to respect the advice and rules on covid restrictions, and remind Members to submit their notes to *Hansard* and to turn off any devices or put them on silent.

Clause 2

Exclusion of review of Upper Tribunal's permission-to-appeal decisions

Amendment proposed (4 November): 43, in clause 2, page 3, line 19, at end insert—

"(1A) Notwithstanding subsection (1), subsections (2) and (3) shall not apply where the party refused permission (or leave) to appeal by the Upper Tribunal was the appellant before the First-tier Tribunal and—

(a) that party was without legal representation and the appeal before the First-tier Tribunal was not within legal aid scope;

(b) that party was not of full age or capacity;

(c) the appeal before the First-tier Tribunal was not an in-country appeal;

(d) the appeal before the First-tier Tribunal was subject to any accelerated procedure;

(e) the decision of the First-tier Tribunal was subject to any statutory restriction or direction concerning how that tribunal was to evaluate the credibility of the appellant or the evidence before it; or

(f) the application to the Upper Tribunal raises a point of law concerning the construction of any statutory provision for interpretation of an international agreement."—*(Andy Slaughter.)*

This amendment is contingent on the interpretative provisions in Amendment 44. This amendment would provide a further list of exceptions to the ousting of the High Court's jurisdiction that is proposed by Clause 2.

The Chair: I remind the Committee that with this we are discussing the following:

Amendment 42, in clause 2, page 3, leave out lines 34 to 37 and insert—

"(c) that decision or the decision against which the Upper Tribunal has refused permission (or leave) to appeal is vitiated by any—

(i) bad faith, or

(ii) fundamental breach of the principles of natural justice."

This amendment would expand the current exception in Clause 2 to ensure it applies to any bad faith or fundamental breach of natural justice.

Amendment 44, in clause 2, page 4, line 8, at end insert—

"'accelerated procedure' means any procedure for which procedure rules permit or require that less time is provided than is the case for another party before the tribunal bringing an appeal under the same statutory right of appeal; and includes an accelerated detained appeal under section 106A(1) of the Nationality, Immigration and Asylum Act 2002;

an appeal is 'not an in-country appeal' if the appellant is only permitted to bring or continue the appeal from outside the United Kingdom;

a party is 'not of full age or capacity' if that party is—

(a) a child, or

(b) requires the assistance of a third party to understand the procedure or decision of, or issues before, the First-tier Tribunal and communicate effectively with that tribunal (whether or not that assistance is provided save to the extent to which the person requires an interpreter and one is provided)

an appeal is 'not within legal scope' if representation before the First-tier Tribunal does not fall within civil legal services under section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

'interpreter' means a person whose sole function in proceedings before the tribunal is to translate between the English language and another language spoken by the appellant;

'legally represented' means having legal services as defined by section 8 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which services must be provided by a person who is not prohibited from providing them by any statute, court order or decision of any relevant professional standards body;

'relevant professional standards body' means a designated professional body as defined by section 86 of the Immigration and Asylum Act 1999 or such other body in England and Wales as may be designated by the Lord Chancellor, in Scotland as may be designated by the Scottish Ministers or in Northern Ireland as may be designated by the Department of Justice in Northern Ireland;

'an international agreement' includes the 1951 UN Convention relating to the Status of Refugees."

This amendment is contingent on Amendment 43. This amendment would provide interpretative provisions for Amendment 43.

The Parliamentary Under-Secretary of State for Justice (James Cartlidge): It is a great pleasure to serve under your chairmanship, Mr Rosindell. I wish everyone a good morning and look forward to another thorough day's examination of this important Bill.

Amendments 43 and 44 seek to reduce the scope of the ouster clause by introducing numerous exemptions. Clause 2 is carefully constructed and consistent, and identifies the kinds of errors the court could make and deals with each separately. The upper tribunal will not be reviewable on errors of law but will be where it has made a true jurisdictional error or where there is evidence of bad faith or a fundamental breach of the principles of natural justice. That is so we can deal with the inefficiency in the current system while providing adequate safeguards.

The exemptions outlined in the amendment would completely undermine the Government's objective of tackling those inefficiencies, as a large number of cases would continue to proceed to the High Court on grounds of error of law without any good reason. I understand that some of the circumstances outlined in the amendment are particularly difficult for the claimant. However, we must trust the upper tribunal to take appropriate and proper decisions on all permission-to-appeal applications. Where there are particular sensitivities, we can be confident that the upper tribunal will have considered those in reaching its decision.

The very low percentage of Cart judicial reviews that actually result in a successful outcome for the claimant—as we have discussed, the figure is about 3.4%—illustrates precisely that point. There is no good reason to treat the sorts of cases that come before the upper tribunal—the majority of which are immigration cases—differently from any other sort of dispute that comes before our courts and tribunals by granting them a third bite at the permission-to-appeal cherry, as we have famously described it, which is what the Cart JR system currently does. The amendments would undermine the consistency of the treatment of appeal decisions by the upper tribunal, making it the final court in some cases but not others, simply because of certain factors relating to the claimant rather than to the nature of the error concerned. Our approach is consistent and justified, and properly empowers the upper tribunal to get on with its important business.

Amendment 42 aims to widen the exception to the ouster clause, which relates to bad faith and fundamental breach of natural justice. It proposes including decisions made by the first-tier tribunal as well as the decision of the upper tribunal. I consider the amendment unnecessary. I am sure hon. Members will agree that judges of the upper tribunal are entirely capable of identifying the sort of blatant and serious errors that constitute bad faith or a fundamental breach of natural justice.

The upper tribunal can be trusted to uphold the rule of law, and the drafting in the Bill sets out with sufficient clarity the exceptional conditions in which the upper tribunal should be subject to judicial review—namely, where it has breached the fundamental principles of natural justice or acted in bad faith. In any case, one would imagine that the upper tribunal knowingly upholding bad faith on the part of the first-tier tribunal would act in breach of the fundamental principles of natural justice. Therefore, including a further provision in the Bill outlining a situation that, in my view, is extremely unlikely to occur, is unnecessary. I urge the hon. Member for Hammersmith to withdraw the amendment.

Andy Slaughter (Hammersmith) (Lab): It is a pleasure to see you in the Chair again, Mr Rosindell, for another sitting to consider this important Bill. I will respond briefly.

The Minister correctly said that the aim of the amendments is to reduce the scope of the ouster clause. That is exactly right, because we do not believe there are adequate safeguards. Without giving away the plot, we will come shortly to the clause stand part debate and our preferred option is to leave the clause out altogether. The amendments are our attempt to say that if the ouster clause were appropriate in the new circumstances, which we do not concede, it should not have such limited exemptions.

The Minister said that the amendment would defeat the Government's purpose by increasing the number of cases that would still be subject to judicial review. It is my submission that that is not the right way to look at it. It is the justice of the case and the consequences for claimants that we should be looking at. To repeat what I said last Thursday, those consequences are often matters of life and death and severe. In addition, the use of judicial review in Cart cases is already heavily constrained. We have focused on the relatively small amount of money that Cart judicial reviews cost—relative in terms of overall judicial budgets—this would be a part of that sum.

The Government should not dismiss this issue. At the very least, they should think about the extent of the ouster clause. That is the purpose of this debate and I do not believe they have thought sufficiently about it. We are, however, coming to the clause stand part debate, in which members of the Committee will be able to express ourselves rather more clearly and fully. On that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

James Cartlidge: Under our current system, if a case is brought unsuccessfully to any chamber of the first-tier tribunal, it is possible to apply to the first tier for permission to appeal to the upper tribunal. If that permission application is refused, an application can be made to the upper tribunal for permission to have the case heard in the upper tribunal. If that fails, an application can be made to the High Court to judicially review the decision by the upper tribunal to refuse permission to appeal. This was the state of affairs brought about by the Cart judgment.

Since the Cart judgment, there have been on average 750 such cases a year. We do not believe that was the intention when the Supreme Court decided Cart. Therefore, clause 2 seeks to remove Cart judicial reviews, by way of a narrow and carefully worded ouster clause.

The Government want to remove Cart reviews because we firmly believe that the situation is a disproportionate use of resources in our justice system. Users of the tribunal system not only have the chance to seek administrative review—for example, if challenging a Home Office decision—but can appeal that decision to the first-tier tribunal and, upon losing that appeal, have both the first-tier and upper tribunals consider whether it is necessary to appeal that decision. To then be able to judicially review a refusal by the upper tribunal is an unnecessary burden on the system. That is not enjoyed in most other areas of law. We are yet to hear from the Labour party why it thinks that immigration cases should have such an exceptional additional right.

Our view is shared by some in the Supreme Court. Lord Hope of Craighead, who was one of the judges in the original Cart JR ruling, has stated that

"experience has shown that our decision has not worked".—[*Official Report, House of Lords,* 22 March 2021; Vol. 811, c. 710.]

He agreed that it is time to end this type of review because of its inefficiencies.

The independent review of administrative law, from which the proposal of this clause comes, concluded that Cart reviews were effective for claimants only 0.22% of the time. That figure was the subject of much criticism, with several critics questioning the independent review's analysis. Officials have worked with academics, judges, practitioners and non-governmental organisations to come to a more definite figure, and concluded that the claimant success rate for judicial reviews in this area is around 3.4%. It is a higher figure, but still incredibly low. Lord Brown's words in the Cart judgment are relevant. He said that

"the rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff."

[James Cartlidge]

We can consider that rate against the claimant success rate for general judicial reviews, for which the independent review found that the general consensus is that it ranges from 30% to 50%. Colleagues will recall Professor Feldman suggesting in evidence that the figure is around 50%. Either way, it is well over 10 times more than the figure for Cart JRs.

Dr Caroline Johnson (Sleaford and North Hykeham) (Con): Does the Minister think it is a little strange that while Opposition Members argue for those immigration cases to maintain having three bites at the cherry, they do not make the same argument for other cases with potentially higher success rate?

James Cartlidge: I am grateful to my hon. Friend, who speaks with great expertise, for making that incredibly important point. Given her medical professional background, she is aware of the importance of the law in good public administration and why the proportionate use of resource is incredibly important. She is absolutely right: we and our constituents have still not heard an explanation as to why, uniquely, immigration cases should have this special right. I am bound to point out that the longer an immigration case is in our courts, the claimant could argue that they have a stronger case to be given a permanent right to remain on human rights grounds.

Tom Hunt (Ipswich) (Con): Given that the Opposition have spent so much time opposing all the steps the Government have taken to fit capacity into the system, does the Minister agree that there is a certain irony that they had planned to hold an Opposition day debate yesterday on how to sort out the court backlog?

James Cartlidge: My hon. Friend may have had sight of the speech I had prepared to wind up yesterday's debate. In fact, I was ready to take part at 10 pm, when rumour had it that the Opposition might still go ahead with the debate. He is absolutely right. We have a serious backlog issue. We have been very open about that. The primary driver of the surge in cases was the fact that courts were closed during the pandemic, and social distancing measures have made it much harder to dispose of cases, particularly in the Crown court. In those circumstances, 180 days of a High Court judge's time is a precious resource indeed, which is why we take the view that exceptions should not be made in these cases. That is not depriving potential migrants of rights because they would still have, to coin that old phrase, two bites at the cherry.

Anne McLaughlin (Glasgow North East) (SNP): If that is the case, and if the Minister is so concerned about the court backlog, does that mean that he will not support the Nationality and Borders Bill, which attempts to criminalise asylum seekers simply for coming to this country because they could not find safe and legal routes, at an estimated cost of an extra £400,000 per year, clogging up the court system even further?

James Cartlidge: It is a fair point, but the hon. Lady and my colleagues may be interested to know another statistic that we have discovered: the average time that these cases take from coming to court to reaching a conclusion is 88 days. That means that hundreds of cases are taking three months to be heard in the High Court. On that basis, we would not bring in new measures to toughen up sentencing on, for example, serious sexual offenders. If we did that, more people would potentially end up being found guilty of those crimes and going to prison for longer, which costs. That is precisely why we are taking measures to free up capacity. For example, in a later part of the Bill we will be remitting more cases from the Crown court to the magistrates court, because it is in the Crown court that those serious crimes will be heard.

Anne McLaughlin *rose—*

James Cartlidge: I will take a second bite at the cherry from the hon. Lady.

Anne McLaughlin: I thank the Minister for that second bite. I know he was not deliberately conflating serious sexual offenders with asylum seekers, but I really want to make that distinction. We are talking about people fleeing for their lives from terrible situations, and in the same sentence he compares them to serious sexual offenders. Does he agree that there is no conflation there?

James Cartlidge: Of course. That is not the point I was making. To be absolutely clear, the point I was making is that we still have to deal with serious acts of violence and crime, whatever the crime may take place. If we do that, our actions may put more pressure on the courts, but I think our constituents would support that. Moreover, if someone comes to the tribunal system seeking immigration to this country, they will have two bites at the cherry—to use that phrase again—which is a consistent position.

Anne McLaughlin *indicated dissent.*

James Cartlidge: The hon. Lady shakes her head. *[Interruption.]* She wants a third bite of the cherry. Well, I am going to ration them a bit, because there are oral questions soon. An inordinate amount of judicial resource is being used to review decisions of broadly equivalent judges who, importantly, are correct in refusing permission to appeal in the overwhelming majority of cases. However, if we take this away in immigration cases, there are still two bites at the cherry, which is consistent with article 13 of the European convention on human rights.

Anne McLaughlin *rose—*

James Cartlidge: I will be very generous and offer the hon. Lady a third bite.

Anne McLaughlin: I have just served on the Nationality and Borders Bill Committee. I did not get a break between that and this Committee—in fact, last week the two clashed—so I know that what the Minister says is not the case. If asylum seekers arrive here by irregular means—in other words, if they come by boat because they cannot find safe and legal routes—they will not have an opportunity to apply for asylum, because they face offshoring and prosecutions. They will end up in the criminal court system before they even have an opportunity to go through the system that the Minister is discussing.

James Cartlidge: Let us be clear and differentiate here. If someone seeks to enter this country illegally, the rule of law and the law of the land apply. We have to deal with them through the courts, as is absolutely right. We think that judicial review is, in effect, an exceptional privilege used in immigration and asylum cases. Some 95% of these are immigration cases, and there are some other types of cases using Cart JR. We think that this is excessive. What we do not think is excessive to use the courts to use the rule of law and all the things that apply in a democracy to ensure that we have effective border controls which, after all, our constituents support. That means that we have the rule of law both at home and for people trying to emigrate to this country, either legally or illegally. The latter is something where our constituents feel particularly strongly that we must be strong in sending a signal that this country is not a light touch for people seeking to enter illegally, even if eventually their asylum claim is found to be legitimate. For those cases, we are generous, and we have shown that in what we have done in the Afghan settlement scheme.

Turning to the method by which are trying to ensure that there is a more proportionate use of resources, the Government understand that there are concerns about the use of these clauses, but we believe that clause 2 as drafted is clear in its intent. Indeed, the independent review of administrative law acknowledged that the use of an ouster clause to deal with a specific issue could be justified. Its nuanced approach emphasised that if there was sufficient justification, and the ouster clause was not too broad or general in scope, it would not undermine the rule of law.

As drafted, clause 2 addresses the previous concerns of the courts in six ways. First, as shown by proposed new section 11A(4)(a), the ouster clause applies only where there is a valid application for permission to appeal from the first-tier tribunal. This is not an extensive ousting of the upper tribunal—it removes only a specific route of review. Secondly, turning to new section 11A(4)(b), the ouster clause does not apply where there is true jurisdictional error. If it were the case that an invalid application was made or there was an application on a criminal law matter, and the court decided to adjudicate it, that would be outside its jurisdiction and open to judicial review. If the upper tribunal was not properly constituted—for instance, if a disqualified judge presided over a hearing—such a hearing would be outside the jurisdiction of the court. The ouster applies where the upper tribunal is functioning as normal, with proper composition of the panel.

Thirdly, two additional exceptions have been added to the clause, to further improve the "safety valve" aspect of the ouster clause. Once again, the Government are not trying to completely oust the upper tribunal's jurisdiction; rather, they are concerned with ousting the ability to review errors of fact and law made by the upper tribunal. This does not include instances where the upper tribunal has acted in bad faith, or where there has been a fundamental breach of the principles of natural justice, such as if the court decided to hear only one side of the case. These issues concern an abuse of the powers of the tribunal, and we do not see merit in ousting such abuses from judicial review.

Fourthly, the clause is limited only to courts. The wording of proposed new section 11A(2) is explicit that the measure involves removing the jurisdiction of courts from other courts—not executive bodies. The impression given by some of the commentary on the Bill since its publication has been that the clause is being used to remove executive power in general from the court's oversight, but that is not the case. It is stopping one court reviewing another court of broadly equal standing.

Fifthly, as a notable point and in defence of the integrity of the Union, the ouster clause does not apply to challenges of decisions from the first-tier tribunal for which jurisdiction was or could have been granted by an Act of the Scottish Parliament or of the Northern Ireland Assembly. The clause is clear and explicit. The Government hope that the effect of drafting the above exceptions, and explicitly stating what is and is not covered by the ouster clause, will be to demonstrate that it is possible to develop such a clause that will be upheld by the courts and that it may well improve practice in future circumstances where such clauses are considered. This is a well-considered ouster clause that is designed to meet a clear policy objective and includes appropriate safety valves to prevent injustice. I hope that the Committee will support clause 2.

9.45 am

Tom Hunt: It is a pleasure to serve under your chairmanship, Mr Rosindell. It is certainly the first time; I would have remembered otherwise. I will talk about clause 2 in a general sense. As I mentioned to my hon. Friend the Minister in my intervention, for which I was very grateful, there is a certain irony here. We have spent so much time debating the measures that the Government have proposed to free up capacity in the court system, but they are being opposed by the Labour party, which then has the cheek to hold an Opposition day debate on Monday purely about the court backlog.

The refugees who are arriving here illegally are potential refugees. Many will not be; many will be economic migrants who are fleeing from France, a safe European country. The 2011 Supreme Court decision that led to Cart JR in relation to these cases was a retrograde step, and in some respects has given judicial review a bad name. Judicial review is an important part of the justice system, but the influence of Cart JR has been negative and has given judicial review, which is very important for our justice system and our democracy, a bad name.

There is a debate about whether the success rate for Cart JR cases is 0.6%, 3% or 5%. A success rate of 5% is still extremely low, compared with 40% or 50% for other types of judicial review. We must bear that in mind. We hear that there are 750 such cases a year, at a cost of £400,000. I raised the issue of the financial cost last week, and this was belittled by a witness, who said that the cost was

"the same amount that DCMS spent on its art collection in 2019-20."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 52, Q75.]

Of course, that is not the key point. The key point is the wider pressure on the court system and on the time of our High Court judges. It is very clear that the pressure that Cart JR puts on the system makes it more difficult for our court system to get back on its feet after the impact of the pandemic. I am pleased with the practical steps that are being taken in other areas of the Bill to help with that.

[Tom Hunt]

This issue of the first, second and third bites of the cherry is interesting. I have not heard any practical reasons why immigration cases should be treated so differently from other cases by having a third bite of the cherry. We hear that, if there is one successful case, and even if only 2% or 3% of cases are successful, that is enough to justify Cart JR. If that is the only argument, why do we not have a fourth bite of the cherry, or a fifth? Can we say with certainty that, if we put the 97% of cases that are unsuccessful in the High Court to the Supreme Court, there will not be one or two that are successful? If one or two were successful, would that justify endless bites of the cherry? At some point, a balance must be struck. There is a limited amount of resources and significant pressure on the system. It is not unreasonable for the elected Government to make a determination about what is and is not reasonable. Even if the success rate is 5%, allowing endless bites of the cherry is not reasonable. It is not a justifiable pressure on the wider system.

Last Thursday, we also heard from the shadow Minister about many instances in which an individual had been successful in a Cart JR case in the High Court. Of course, such cases would have contributed to the 3% or 5%, but we would be here for about a week if we were to hear about each individual case that formed the 95%, or the 97%. Let us be absolutely clear: many of those individuals would be having a pernicious influence and a negative impact on our country—they would be illegal immigrants—and, frankly, the sooner we can get them out of the country, the better.

Anne McLaughlin: The hon. Member is talking about the sooner we can get rid of these people out of the country. One of the people I spoke about on Second Reading was a Venezuelan man who fled after state actors murdered a friend of his. He knew that he was in danger because he had witnessed that. The first-tier tribunal and the upper tribunal did not interpret his evidence correctly, according to the subsequent judge, after the Venezuelan man successfully got a judicial review. He is surely one of those people whom the hon. Member is talking about—the sooner that we can get rid of these people—because he would lose the right to have his appeal judicially reviewed, if the Member gets his way.

Tom Hunt: The sad reality is that in any justice system in the world, every now and then, there will sadly be a case that is not—but can we say with complete confidence that every case heard in the High Court has the right outcome? Perhaps, as I was saying, that is having a fourth or fifth bite at the cherry. We also need to reflect on the fact that the vast majority of these cases are not a good use of our judges' time. They are not worthy of a further bite at the cherry. What is the practical argument for why they should be treated differently from anyone else in the justice system, who has two bites at the cherry? There is no argument for it.

I will draw my comments to a conclusion. Broadly, I welcome the Government's moves in clause 2. The vast majority of my constituents would support what is happening. They believe in a fair justice system, in which we have a right to appeal—which we have here; that is not being changed—but they are realistic about the wider pressures on the court and justice systems. They see the Labour party doing everything it can to oppose reasonable and justified means to free up capacity in the courts system, while coming up with no practical arguments for how it would do so or that would be better than what the Government have suggested. That is unreasonable. Also, it is wrong to say that everyone who is going to go down this Cart JR route is not abusing the system and our good generosity as a country, because many are.

Sir John Hayes (South Holland and The Deepings) (Con): I am inspired to speak to this part in our consideration, partly by the Minister's eloquent explanation of why the amendments are undesirable, partly by the wise words of my hon. Friend the Member for Ipswich on how the traditional system is in a way being besmirched by the gaming of it, in particular in immigration cases, and partly because of the delight of serving under your chairmanship, Mr Rosindell, which I have not done often, but am particularly pleased to do, under the watchful gaze of one of my political heroes, Joe Chamberlain, who began life as a radical and ended it as a member of a Tory Government, understanding, as you and I do, that liberalism is the triumph of frenzied licence over dutiful obligation. It is because of obligation and, in the spirit of Chamberlain, our patriotic respect for our constitution that we must resist the amendments.

To hear some critics of the Bill, one might think that the Cart was embedded in the settlement between Parliament and the courts, and yet it is a modern thing. As you know, Mr Rosindell, it is the product of a decision by the Supreme Court as recently as 2011, when it declared that the High Court could judicially review decisions of the upper tribunal to refuse permission to appeal from the first-tier tribunal, whereas previously it was held that it could not.

At the heart of our consideration of the Bill is a fundamental difference about the character of our belief in the character of judicial review, but also a difference in our understanding of the separation of powers. We saw that in our evidence sessions. We had evidence from academics, notably Professor Ekins who, by the way, authored the report by Policy Exchange—which I commend for its excellent work on this subject. He was very clear that some of the recent decisions by the Supreme Court and other parts of the court system have challenged the supremacy of Parliament.

We also heard from Aidan O'Neill, who said he was a constitutional lawyer, and I understand he is—quite a notable one, from what I read. He said that this was about mutual respect, but mutuality is not the basis of our constitutional settlement. The roles of Parliament and the courts are distinct—the separation of powers; the clue is in the name. Of course there is a relationship between them, because this place makes laws and the courts oversee laws, but judge-made law is not consistent with our constitutional settlement and some of the perverse decisions of the courts in recent years have led, in the words of Professor Ekins, to parliamentary sovereignty being openly questioned. He said:

"Parliamentary sovereignty was openly questioned and the rule of law was set in apparent tension with parliamentary sovereignty, which is deeply wrong, I think".—[*Official Report, Judicial Review and Courts Public Bill Committee,2 November 2021*; *c15, Q9.*]

The defence of the rule of law is not a valid one, as the Attorney General made clear in her speech on these matters very recently.

The issue before us in respect of these amendments is clear. The judgment that was made in 2011 opened a new avenue of judicial review and those Cart judicial review cases have mushroomed since. This is particularly true for immigration cases, as my hon. Friend the Member for Ipswich said a few moments ago—not exclusively so, as the Minister pointed out, but largely. This has to be changed. Given that a previous Labour Government tried to tighten the requirements for judicial review, it is surprising that the current Opposition do not understand that this is a return to a stable and steady position—a normal position—that enshrines judicial review as an important part of the way in which citizens can acquire justice, but does not allow it to become what it has become, a means for people to perpetuate political debates that they have lost earlier. This is using the courts to—I never thought we would be speaking so much about fruit during the course of our deliberations, but to use the word that has been used several times before—have many bites of the cherry. We ought perhaps to think about another fruit, just for the sake of variety, but I suppose cherries will do for the sake of argument.

As I pointed out when we last met, the Opposition were going to have a debate yesterday on the court backlog. The amendments seem to me to have the effect of doing the very opposite and do not address the issue of the court backlog. We know that a very small number of cases that are brought under Cart judicial review—something like 3%—are successful, and yet there were around 750 per year between 2026 and 2019. We have many cases being brought on a wing and a prayer, with neither the wing flying nor the prayer being answered in terms of the result of the case. There is a pressing need, just on those practical terms, to reform judicial review in this respect.

I say to the Minister—not provocatively, but I hope helpfully—that I think the Bill can go much further. I think it is a very modest reform of judicial review. I refer him again to Professor Ekins's work. There is a good argument for changing the rules of evidence, for example, which would tighten the system considerably. There is a good case for dealing with the effects of the Adams case, the Miller case and the privacy case, which he will know had profound effects on judicial review and on the balance between Parliament and the courts.

10 am

I wonder whether the Government might, in the course of our deliberations, think about the further changes that could be made, using this opportunity, and bring forward some radical and exciting amendments during our consideration. As you know, Mr Rosindell, with your long experience and great wisdom, Bills are very unlike the Acts that they become. All Bills start in one form and metamorphosise during their passage through the rigorous scrutiny that they receive in this place, and sometimes the good arguments put by Opposition parties. I do not in any sense say that Bills are not improved by that scrutiny, but they are also improved by the diligence of Back-Bench Members from the governing party, whom I know Ministers listen to with appropriate care and interest.

Therefore I simply say that these amendments are unhelpful in terms of the Opposition's stated intent of clearing the court backlog, unhelpful in failing to grasp the pressing problem of the constitutional imbalance that is emerging as a result of judicial activism, and unhelpful in terms of retaining the integrity of judicial review. And I say this, because I know that the hon. Member for Hammersmith is an experienced Member of the House and I appreciate that he has gone about his work with diligence—I see part of my duty as to bring light to his darkness. I am surprised that the hon. Gentleman has moved and spoken to these amendments, because I am sure that he will want to have a prevailing system that not only works, but is worthy of respect. In those terms, and not wishing to delay the Committee unduly, I strongly support the Minister's position in resisting the amendments before us and strongly support, too, the proposals before the House to reverse the peculiar decision made in 2011, which is not unlike some other peculiar decisions that have emanated from the Supreme Court.

Janet Daby (Lewisham East) (Lab): I am also inspired to speak in this debate. I think that I would be doing my constituents an injustice if I were not to say something on this really important issue. I give credit to the hon. Member for Glasgow North East, who tried to give more of a human approach, through the experience of the person who went through the court proceedings to do with Venezuela. I appreciate her attempt to do that, although it was not very well received by Government Members.

I just want to share a few things. I do not come from a legal background, but I do come from a social care background, and I have worked with refugees and asylum seekers in the past. People may or may not be aware of some of the really abusive situations that they face when they are travelling from their country of origin and try to find passage over here. Some of the stories that I am aware of involving young people and children, although the clause is not necessarily about children, are absolutely horrific. People are raped, abused and threatened at gunpoint to be silent. It is very disturbing to hear of those cases. When there is not enough evidence, or evidence is not being received properly, during the first court hearing and the second, but it is found, during the third hearing, that actually there is a clearer understanding and a clarity that then would go on to save somebody from suffering a level of persecution if they were returned to their country of origin, I think that is worth while.

I do not want to take up too much time, but I will briefly talk about just one case that I happened to work on when I was working as a social worker. It involved a person who was seeking political asylum at the time. He went through the process three times and eventually received status in this country. But on one occasion, his parent was very ill and on the brink of death, so he decided to go back to his country of origin. I am not going to name names or countries, because of confidentiality, but he went back to that country to try to see his mother. Then his wife frantically came to me to say, "He hasn't returned home on his flight. He's been missing for two days. Can you help?" At the time, I did not know what to do to help, but I contacted the embassy, and the embassy contacted the country, and found out this person's identity and that he had been

[Janet Daby]

put in prison. It was almost as if the keys had been thrown away because they realised who he was. After the contact that I was able to make with the Government, they were able to put him on a flight back, because somebody showed some care in his situation.

My point is that we are talking about human beings and human lives. We are talking about saving people from persecution and death if they return to certain countries of origin. I am talking specifically about asylum seekers and people who need refuge in our country.

Andy Slaughter: We are debating the merits of clause 2 as a whole. We will not support clause stand part for two reasons. First, we believe that it insulates serious cases from judicial review, and not a small number of those. Secondly, it opens the door to wider use of ouster, which should be resisted, or at least examined closely.

As I listened carefully to the Minister and Government Back Benchers, I identified essentially two arguments. One is that in supporting Cart judicial review there is some element of special pleading—the fruit-based analogy, if we can put it that way. The second is that the clause would in some way address the court backlog. I said a bit about that, but let me deal with it briefly. I am not entirely sure how a relatively small amendment, in terms of cost and the number of cases, to the way judicial review works will assist with the Crown court backlog of 60,000 cases. The idea that the solution is to get rid of Cart judicial review rather than having sufficient Crown Prosecution Service prosecutors, defence counsel and recorders or, indeed, a sufficient number of courts is a fantasy. Can we not set that aside?

Sir John Hayes: I do not want to prolong the hon. Gentleman's peroration except to say that a third argument has been made, which relates to the integrity of judicial review per se. When only 3% of Cart cases are successful—20-odd cases out of 750—the very integrity of the system is undermined. Notwithstanding the backlog, surely he accepts that it is important that we reform something that is clearly going badly wrong.

Andy Slaughter: I do not accept that as a separate point. I understand that that has been the thrust of the right hon. Gentleman's argument in Committee, but it is a criticism of his own Government rather than my approach. In my view, the Bill does not go far enough and does not approach judicial review in sufficiently robust or constitutional terms; rather, it is taking what we have described as a tit-for-tat approach. However, we are where we are with the Bill. That is a matter that he must take up with his own side. I will talk about the 5%, but I do not want to say any more about the backlog. It is an incredibly important issue, and I look forward to the debate on that resuming, but frankly it is irrelevant to our proceedings, and it is a stretch to introduce it.

On the matter of cherries, this has been characterised as simply an immigration matter. Most Cart judicial reviews are of immigration cases; that is important in terms of the consequences, but it is not solely about those cases. If one listened to what Government Back Benchers say, one would think it was solely about that, but as has been said several times, Cart was not an immigration case. This form of judicial review applies to upper tribunal cases, regardless of whether they are immigration cases. That needs to be on the record.

I was looking yesterday at written evidence from Justice on the cherry point—other Members may have seen it as well. It is brief so I will read it, because Justice puts in better than I could, and I think we probably need to take this head on. Justice says:

"Cart JRs are not about having a 'third bite at the cherry.' There is also an important wider public interest at stake. Cart JRs prevent the UT from becoming insulated from review, by ensuring that there is a means by which errors of law, which could have very significant and ongoing impacts across the tribunal system, can be identified and corrected. As Lord Philips said, Cart JRs 'guard against the risk that errors of law of real significance slip through the system'. UT judges are specialists in their field, however as Lady Hale recognised 'no-one is infallible'. Cart JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within the tribunals system, with the UT continuing to follow erroneous precedent that itself, or a higher court has set.

The Cart JR cases that succeed will involve either (i) an important point of principle or practice, which would not otherwise be considered; or (ii) some other compelling reason, such as a wholesale collapse of fair procedure. These are the second-tier appeals conditions that were set as a threshold by the Supreme Court in Cart, and are now in the Civil Procedure Rules, for a Cart JR to be considered. The Supreme Court sought to address the most significant injustices while making efficient use of judicial resources. It was in fact the Supreme Court's intention that few Cart JRs would be successful, but those that were would be the most egregious and important cases with serious errors of law.

Due to the second-tier appeals conditions, Cart JRs involve only the most serious errors of law. If a Cart JR is successful, it will mean that the applicant had not been given a lawful 'proper first bite of the cherry' in appealing a decision to the FTT, and the UT had unlawfully refused permission to appeal the unlawfulness. Cart JRs also do not in any way determine the claimant's substantive case, or whether the claimant should be allowed permission to appeal—this is for the UT to decide following a successful Cart JR.

It is also wrong and, as described by Lady Hale in Cart, a 'constitutional solecism' that since Parliament designated the UT as a 'superior court of record' Parliament excluded any possibility of judicial review. The decision in Cart did not involve the interpretation of any statutory provision that could be described as an ouster clause, and statutorily designating a body as a superior court of record, as Laws L.J. pointed out at first instance, 'says nothing on its face about judicial review'."

That is all I want to say about cherries this morning, but I think we have been led into the orchard erroneously on that point.

The Minister quoted one or two Supreme Court members. I could quote a number in aid of my submissions, but I will limit myself to three different types of advocate who would not always support Cart cases specifically. One, whom I think I mentioned on Second Reading, is Lord Neuberger, a former President of the Supreme Court. He said only a couple of weeks ago that it is "always worth remembering" that judicial review

"is what ensures that the executive arm of government keeps to the law and that individual rights are protected. Ouster clauses, for example, which are intended to ensure a particular class of decision cannot be judicially reviewed, carry with them the inevitable implication that whoever has the protection of the ouster clause has the right to break the law with impunity."

One of our witnesses was Professor Feldman, who gave a balanced account of his view of the Bill. He said during our evidence session on this matter that

"I think it is important to note that parliamentary sovereignty and the rule of law generally require that people should have access to courts to determine the lawfulness of action. There is a functional inconsistency between Parliament's saying that there are limits to the powers of a body or person and, on the other hand, saying that that person or body can decide for themselves, effectively, what those limits are. That is quite apart from the importance of access to courts for the rule of law."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 25, Q24.]

10.15 am

Finally, I promised Members a further quote from the right hon. Member for Haltemprice and Howden (Mr Davis). I refer them to his article, written just before Second Reading, I think, in which he said:

"Essentially, this is the government legislating to deny a court jurisdiction in a certain matter. Left unchecked, the use of these ouster clauses could give the government free rein to designate certain decisions that it has made, or the use of certain powers it hands itself, to be unchallengeable in the courts…As a Conservative party, we are rightly proud of our heritage that champions individual liberty alongside a fair and balanced rule of law—judicial review is fundamental to these twin ideological pillars. It would be wrong for this government to sacrifice these virtues on the altar of power".

I am sure that Government Members will reflect very seriously on those words.

Going back to the point that the right hon. Member for South Holland and The Deepings raised a few moments ago, our first difficulty with the proposals on Cart in clause 2 is that we say the success rate is a significant number. I am not going to rehearse the long argument I made on Thursday about percentages, but the Government perceive the success rate percentage to be 3.4%; some of our experts thought that figure was about 5%; and looking at the overall success rate—that is, how decisions are determined throughout the Cart process—a good case could be made for a figure more like 7% or 7.5%. However, whatever the figure is, those are significant numbers. They may not be a majority of cases, but they are a significant number of cases. It has also been said that the reason why the figure is 5% or thereabouts, which is lower than other branches of judicial review, may be that that judicial review is more often review of decisions by public authorities, including the Government, which for a variety of reasons are perhaps more prone to error than the upper tribunal. However, that does not mean that the upper tribunal cannot also make errors that are egregious and need correction.

The procedure in Cart is both an accelerated and a constrained procedure. There are tight limitations on both timescales and process, and in the way that matters are dealt with on paper rather than orally, so the courts have taken all those matters into consideration. It is not as though the Government are discovering that, for the first time, they have come across some terrible area of judicial profligacy.

Dr Johnson: The hon. Gentleman is making an argument about the importance of being able to review almost any decision. He said he accepts that judicial review in normal circumstances is looking at Government administrative decisions, and that is what it was set up for, yet in this particular case—the Cart case—it is reviewing a judicial decision. Will the hon. Gentleman therefore clarify whether it is his position and that of the Opposition that all judicial decisions made at this level should be subject to review, and that this third bite of the cherry, as the Minister has said, should not be open only to those undertaking immigration cases? As his hon. Friend the Member for Lewisham East said, those are serious and important cases, but other cases going through the courts also have serious and profound consequences for those taking part in them. Should everybody be able to review a decision that has been made at High Court level?

Andy Slaughter: The answer is that it is horses for courses, or Carts for carts. The hon. Lady says that this is just about immigration cases. Let me say first that it is important to correct decisions that have significant consequences for individuals or society more generally. However, the reason I gave a number of case summaries was to show not just that there are a number, but that they are quite compelling cases.

A little chill ran down my spine when I heard Government Members talking about gaming the system and getting out of the country. I wonder whether they would use those analogies in relation to other types of case. We have an extremely low success rate in prosecution and conviction for rape, but I do not think that the vast majority of those cases that do not result in a conviction would be described as gaming, in the way that apparently 97% of these cases are described.

James Cartlidge: That is a terrible comparison.

Andy Slaughter: It is not a comparison. It is asking the Government to say why they think it is gaming if a case that has been prosecuted through the courts or taken to the administrative people is unsuccessful.

Dr Johnson: I am sorry if my question was not clear, but I have not really had an answer to it. Do the Opposition believe that all judicial decisions made at upper tribunal or superior court of record level should be subject to review in the way that the Cart JR provides specifically for immigration cases?

Andy Slaughter: We have explored at some length the effect of Cart as it operates at the moment, but I have not heard from the Government how they think those cases should be addressed, other than saying, "Well, every system has its losers and we will just have to live with the consequences of that," either because of the financial cost or for some other reason.

Dr Johnson: Again, I am sorry if I am not explaining my question clearly, but does the hon. Gentleman believe that all people who take a case to court, perhaps with profound consequences on their lives, should have that third bite of the cherry? Is he arguing for all decisions to have judicial review, or does he believe that cases in the Cart—that is to say immigration cases—should specifically get an extra third bite that others do not get?

Andy Slaughter: I am not going to go back to third bites of the cherry again. I know there is an idea that somehow there is an unfairness or a special privilege or pleading that exists in these cases, but that is not the way the law has developed here. The Government need better arguments on how the type of cases that Cart deals with should be dealt with, as my hon. Friend the Member for Lewisham East said. If the answer in Cart

[Andy Slaughter]

cases is that we want to get people out of the country, that can result in torture, death, and people and their families being put in extremis, as we saw clearly in the case summaries I gave,. That is what I am not hearing.

I am repeating myself, Mr Rosindell, so I will not go on further and I will draw my remarks to a close. Something caught my eye the other night when I was looking at the Government's response to the consultation they undertook when they were dissatisfied with Lord Faulks's report. The responses to that consultation were also overwhelmingly against them, and they commented:

"Respondents argued that, at most, there are a handful of court decisions that were arguably incorrect and that, therefore, there isn't a wider problem to address. This reasoning is predicated on the view that a problem is not a problem unless it happens often. The Government is not persuaded by that argument, since even a single case can have wide ramifications."

That is their argument and, in some ways, it parallels what the right hon. Member for South Holland and The Deepings said previously about the need to look in more detail at types of judicial review to see if they are meritorious or not. The Government say that

"even a single case can have wide ramifications."

If that applies to judicial review more widely, why does it not also apply in Cart cases?

Until the Government can sufficiently address how they will deal with successful cases in Cart, why they think this particular area of law needs the attention it gets in this Bill and why the development of judicial review here cannot be left to the senior judiciary, as it is in almost every other case, we will not support the clause and we will vote against the clause stand part.

Anne McLaughlin: I am told it will be a great pleasure to serve under your chairmanship, Mr Rosindell. I am sure it will be.

As I often say in this place, we never know who is watching. We probably do not have a huge audience watching this debate, and I understand it is going out in audio only at the moment, unless that has been fixed. However, some people will be listening or watching, so it is worth repeating exactly what is happening here so that lay people understand. I will briefly go over it.

If an individual feels that a public body—for example, their local NHS, the Department for Work and Pensions or the Home Office—has failed to correctly apply the law in making a decision about their case, they can appeal to the first-tier tribunal. If that finds against them and the individual believes that there is an error of law, perhaps by overlooking vital evidence or by misinterpreting the rules, they can apply to the first-tier tribunal for permission to appeal at the upper tribunal. If the upper tribunal refuses to appeal the decision, right now that person can ask to have the decision judicially reviewed.

All sorts of criteria have to be met. Someone does not simply say, "Can I have a judicial review?" and get it, but right now they can at least apply. What we are discussing today—clause 2—would take that right away from them. There has been talk about how many bites of the cherry someone can have, but only the tribunal system is having the independent oversight of judicial review removed. All other judicial reviews will continue, and the Minister said that in his speech. I am not sure that is something to be proud of, because we know that the tribunal system often deals with the least powerful in our society. That is who we are removing the access and the right to justice from.

As the Law Society of Scotland has pointed out, decisions on appeal at the tribunal are often taken by a single judge based on the paperwork alone, so the person bringing the appeal has no opportunity to make their case in person, nor to answer any questions that the judge might have. In the last week, we have heard all sorts of arguments about how the powerful—in other words, MPs—have to have more opportunities to plead their case. In terms of the Committee on Standards, a huge number of Conservative MPs talked about how the case was decided on the paperwork, which it was not—that is not quite true—but a lot of the evidence was considered in writing alone, which is somehow wrong when it comes to powerful MPs, but right when it comes to people in vulnerable positions. The opportunity to judicially review the decision of the upper tribunal is a vital last line of defence in cases in which the most fundamental of human rights are engaged.

The Immigration Law Practitioners Association collated 57 real-life case studies of people who had accessed the right that they will no longer have once this legislation is passed. The case studies included a child who applied to remain in the UK in order to receive life-saving treatment, the asylum claim of a victim of human trafficking and female genital mutilation, and many other deportation and asylum decisions whereby, if deported—we have talked about the man who witnessed a murder in Venezuela—their lives would be at risk or they would be separated from their family. If we go ahead with this measure, that is what would happen, and I do not know how anybody here in Committee can justify that.

It is important to explain for anybody not au fait with the legal system that we have different layers of decision making because sometimes decision makers get it wrong. I will give a couple of examples. I sat on the Committee that considered the Nationality and Borders Bill, so I was not here for the first sitting of this Committee. I was astonished to read that a member of this Committee asked why any judge's decision should be questioned. A fundamental part of our justice system is that we accept that decision makers, including judges, get it wrong and have to be questioned.

The justification given by the Government for ousting Cart and Eba in Scotland is the high volume of applications versus the real number of successful outcomes. Let us look at that. The evidence to support that position was so flawed that the Office for Statistics Regulation launched an investigation. It found that the real success rate was at least 15 times higher than the Government's figures. Why did they use those figures in the first place? Was it because they knew that if people understood just how many people it does affect, they might have less sympathy with their position?

10.30 am

The Government seem to class an appeal as successful only if it does three things: overturns the decision of the upper tribunal, gives permission to appeal, and the appeal is won further up the chain. They completely miss the point that Cart reviews serve to correct errors of law, even if the appeal is ultimately unsuccessful. If a

court misinterprets the legislation or fails to consider the evidence, it is important that lessons are learned from that.

The hon. Member for Hammersmith has quoted Lord Justice Phillips, and I think the matter was well summed up by Zoe Gardner of the Joint Council for the Welfare of Immigrants, who said:

"Allowing any actor free reign to exercise a power without the possibility of scrutiny is alien to the democratic principles under which we are governed."

By definition, a successful Cart JR involves a clarification of an important point of law to ensure fair procedure. That has been a much-debated term in this last week; we have talked about natural justice over and over again, which is something Opposition Members were asked to consider in the call to reform the standards regime.

The Leader of the House said there was

"a very strong feeling on both sides of the House that there is a need for an appeals process"—[*Official Report*, 4 November 2021; Vol. 702, c. 1054.]

and that he would work with other parties to make improvements to the system. It is funny how important the appeals process becomes when it is about us. Well, we do not need to make improvements to the Cart JR process as it stands; we just need to preserve it.

The Government also insisted, as we have heard, that this measure will save valuable judicial resources and money, but again, their own assessment says it will save only about £400,000 per year. Even that figure is unfairly inflated, because it considers the cost of the upper tribunal rehearing the case, which will occur because an unlawful upper tribunal permission decision has been identified by other courts. To include those costs in the impact assessment is to include savings that result from allowing unlawful decisions to stand. That position is just not acceptable.

Tom Hunt: A number of amendments have made it quite clear that the key issue is not the financial cost but the wider significant pressure that is put on limited, finite judicial resources. Will the hon. Member address that point?

Anne McLaughlin: I certainly will. If we are talking about saving £400,000, here is my suggestion for another way to do it: do not criminalise legitimate asylum seekers simply because we did not supply safe and legal routes, and they were so desperate that they arrived in this country by boat. Some £400,000 per year is what it will cost to criminalise them, according to the Refugee Council of England. Just do not do that and we will not have to worry about that cost saving.

Dr Johnson: Will the hon. Lady give way?

Anne McLaughlin: Briefly.

Dr Johnson: It is therefore the hon. Lady's position that the Government should give legal passage to those people who are arriving on boats from France—perhaps put on ferries for them? Does she recognise that that could lead to increased trafficking of people and increased suffering?

Anne McLaughlin: No. I still think that is an absolute nonsense. If we are going to have a debate about the Nationality and Borders Bill and the wickedness of pushing back not boats, but people—human beings are on those boats—I am happy to do so, but I do not imagine the hon. Lady will be happy with that. I am happy to have a conversation about that afterwards.

Angela Crawley (Lanark and Hamilton East) (SNP): Is it not the case that, because there are no safe and legal routes available, the Government have made that passage practically impossible, and the associated member states, which also have a responsibility, have made it impossible? Those individuals are falling into the hands of criminal gangs—traffickers—and are being exploited. Therefore, safe passage is not possible for many people.

Anne McLaughlin: I absolutely agree with that. I am happy to talk about this because I do not think the Government have a leg to stand on when it comes to how they plan to treat the most vulnerable human beings on our planet.

That takes me to some examples of why the Cart JR is so important. I talked about the case of the Venezuelan man, and a Conservative Member said that it was sad but true that some people would fall through the net. We are not talking about somebody appealing a parking fine; we are talking about somebody who is alive today because he was able to access—

Tom Hunt: Will the hon. Lady give way?

Anne McLaughlin: Absolutely. I would love to hear what the hon. Gentleman has to say.

Tom Hunt: If that is the case, does the hon. Lady support a fourth, fifth or sixth bite of the cherry? How can we guarantee that at the third bite of the cherry we are going to get everyone right?

Anne McLaughlin: The "third bite of the cherry" is not about whether the case is correct or the person's claim is correct; it is about whether they got the correct process and mechanics in the first place. If they were not able to access justice in the first place, they should have the right to have that heard by a judge.

Tom Hunt: I take the hon. Lady's point about the distinction in respect of what we are looking at, but people can still get that wrong. Does she support the fourth and fifth bite of the cherry?

Anne McLaughlin: I think the hon. Member is trying to trivialise what we are talking about and I am not going to entertain it any longer. To my mind, the justice system should not accept that sometimes people will end up dead because we did not get it right. We should be striving for justice always, not accepting injustice. I am not entirely sure that Government Members are interested, but I am going to look at some more examples given by ILPA, although I could probably give numerous examples involving my own constituents.

There is the woman from Uganda who could not live there because she is a lesbian. The first-tier tribunal and the upper tribunal refused her case and her renewed permission to appeal because they received a letter from her saying, "I have come here for a job. I am not a lesbian. Sorry I am a liar." Anybody can see that that letter did not come from her. The upper tribunal judge admired her candour, but it was not her who wrote it; it

[Anne McLaughlin]

was the appellant's homophobic housemate. We must bear it in mind that people are given housemates when in the asylum system; they do not go and choose them. Thankfully, ILPA stepped in, she was given the right to a judicial review and won her case. She is able to live as who she is and the person she is, not having to hide from violence or homophobia, thanks to judicial review.

Sir John Hayes: I wonder whether the hon. Lady will provide some clarity about the parameters within which she believes the system should work. Presumably, she cannot be saying that there should be unlimited rights of appeal. She cannot be saying that there should be no structure around how people can access courts and use them. She cannot be saying that every person who arrives in Britain should be able to appeal again and again. There must be some limits, some parameters, some rules and some grounds. What are they?

Anne McLaughlin: We have them already. I am perfectly happy with what is in place. It is the right hon. Gentleman's Government who seek to change that and take away people's access to justice. It is not me who is trying to change it. I am the one trying to stop them changing it and taking away people's rights.

I will tell the Committee about another case. The claimant was in a relationship with a British citizen, and they had two children who were also British citizens, but the claimant's partner suffered from serious health conditions. The claimant's argument that removal would breach their right to respect for family life was dismissed by the first-tier tribunal and permission to appeal was refused. Following a Cart judicial review—the thing that Government Members want to take away from these people—the decision was overturned. The upper tribunal allowed the appeal under article 8. However, without the Cart judicial review, the family would have been separated.

The final person I want to talk about, from the Public Law Project's evidence, is a Sri Lankan national who feared persecution, partly because of his involvement in diaspora activities in the UK. His perception was that he would be viewed as someone who was seeking to destabilise the integrity of Sri Lanka. It was argued that the first-tier tribunal judge had acted procedurally unfairly in refusing to consider all the evidence, including valuable video evidence, when deciding that the appellant was not actively involved in diaspora activities as claimed. Permission to appeal was refused by both the first-tier tribunal and the upper tribunal, but was finally granted on appeal, where it was considered that there were legal and compelling reasons for granting permission. An order was made quashing the upper tribunal refusing permission.

Sir John Hayes: I wonder whether the hon. Lady will give me one more bite of the cherry.

Anne McLaughlin: I will finish this story. Before the hearing in the upper tribunal, the Home Office conceded the appeal and accepted that the appellant was a refugee. If Cart had not been an option, that man would have faced deportation and almost certain persecution. Having lived and worked in Sri Lanka, and having kept in touch with many people there and many Sri Lankans living here, I can tell Members that that man almost certainly would not still be here had he been deported and denied access to Cart judicial review—the thing the right hon. Gentleman wants to take away. I will let him come in and explain that.

Sir John Hayes: But 97% of these cases fail, and they fail on the grounds that the hon. Lady says she supports—she supports the existing system, as she made clear in her answer to my previous intervention. Given that she supports the existing system, and 97% of these cases fail, does she not recognise that something is going badly wrong?

When cases fail in respect of immigration, does she support the rapid deportation of people who have been through the system, sometimes more than once, and failed and had their case found to be wanting? Does she want those people who are found to be acting illegally to be deported, as we all do?

Anne McLaughlin: I have lost track of all the questions.

Sir John Hayes: I said 97% of cases fail. When they fail, those people have exhausted the legal avenues that the hon. Lady says she supports—the current system, criteria and means by which people can make their case. When immigration cases fail, does she support the speedy deportation of those people?

Anne McLaughlin: On the issue of 97% of the cases failing, if the decision-making processes at the beginning of the claim were better, we would not have all those people going through the tribunal system. I absolutely support improving the capacity and decision-making process in the Home Office.

Angela Crawley *rose—*

Paula Barker (Liverpool, Wavertree) (Lab) *rose—*

Anne McLaughlin: There's a competition. I will go to the left first.

Angela Crawley: Is it not the case that those figures have been widely disputed? We have covered that intensively already. The Government's parameters for success and failure are defined fairly arbitrarily in comparison with what we would understand or define as a successful testing principle, which is what judicial review is designed for.

Anne McLaughlin: I thank my hon. Friend for reminding me of that. I foolishly accepted the 97%, knowing it was not correct.

Paula Barker: The hon. Lady has been generous with her time. Does she agree that, as we heard in the evidence session, Cart reviews are not just about immigration? They are also about sexual justice cases. It is starting to feel as if the Government wish to have a further bite of the cherry in their hostile immigration policy.

Anne McLaughlin: That is an excellent intervention and I absolutely agree. Interestingly, my notes state that we are not just talking about immigration. I agree about the hostile environment; it is vile. If I am right in saying that most of them could not care less about migrants, let us talk about cases of access to vital benefits for

people with disabilities and others facing destitution and homelessness, who will be affected. Those are people who have been left without a last line of defence. This legislation will affect all four chambers of the upper tribunal. Individuals will no longer be able to apply to the High Court.

Dr Johnson: The hon. Lady said that she believes that we do not care about migrants. I find that deeply offensive. As a paediatrician I have worked with children who have been alone—unaccompanied asylum seekers—examining them and looking at their injuries and scars. We do care very much about migrants and reducing people trafficking—this evil, barbaric trading of people, which we need to stop.

10.45 am

Anne McLaughlin: What I find offensive is the way in which asylum seekers are treated right now, and the much more awful way that they will be treated if the Nationality and Borders Bill goes through in its current form—or, actually, in any form. I find that utterly offensive. I understand that on a one-to-one basis people will show kindness to individuals, but the hon. Lady is still going to vote for a system that will criminalise people who are desperate enough that they have no choice but to flee from their country, including people in Afghanistan right now whom we have not given safe and legal routes. They cannot wait any longer; they will die if they wait any longer. The hon. Lady will vote to criminalise them, or to offshore them, or to separate them from their families.

I am really pleased and absolutely certain that, one to one, the hon. Lady shows nothing but kindness and respect for people. However, that is very different from voting for a policy that does all the things that I just listed.

Angela Crawley: I am grateful to the hon. Member for Sleaford and North Hykeham for also making that point. Is not the essence of the problem, therefore, that the criminality that should be targeted is that of the traffickers and those who are exploiting these vulnerable individuals, rather than the individuals themselves—individuals who, through no fault of their own, when they arrive in the UK, are in an absolutely destitute situation? To criminalise them for using an illegal channel does not get to the root of the problem, which the hon. Lady has already correctly identified.

Anne McLaughlin: I could not have put it better myself. I completely agree with that. I do want to go on to look at other people who will be affected. Let us imagine that the Members opposite are not that bothered about asylum seekers and migrants, but they do care about people with disabilities. Currently, 16% of the working-age population live with a disability. That rises to 45% of adults over the state pension age.

Nobody can guarantee that they will not, one day, have a disability—that they will not, one day, be absolutely dependent on being able to access disability benefits. If for some reason they were to be wrongly denied those benefits, as happens far too often, and appeal to the courts, they need to have the right to question the decision-making process because, as we have heard, decision makers do not always get it right.

Sir John Hayes: On a point of fact, could the hon. Lady tell us how many Cart cases are brought by disabled people?

Anne McLaughlin: Strangely enough, no I cannot. Can the right hon. Gentleman tell us?

Sir John Hayes: The hon. Lady must know that over 90% of Cart cases are immigration cases, although it is possible that some of those people might themselves be disabled. If she then takes the fewer than 10% of cases that are not immigration cases, a small minority of those will be of the kind she is describing. Of course, the hon. Lady is right that when disabled people are disadvantaged and need recourse to law, they should have it. However, the idea that she is promulgating—that somehow the Government are acting in a way that is disadvantageous to significant numbers of disabled people in the way she is suggesting—is not only inaccurate but irresponsible.

Anne McLaughlin: I do not think I suggested that there were huge numbers of cases of people with disabilities. What I said was that there are huge numbers of people with disabilities and huge numbers of people who could have disabilities in the future, and that they will be denied access to justice if they do not get justice first time around. That happens so often.

Sir John Hayes: We could all have disabilities in the future.

Anne McLaughlin: Can I sit down and chat as well?

The Chair: Is the hon. Lady giving way?

Anne McLaughlin: Is the right hon. Gentleman asking me to give way?

Sir John Hayes: I have given up.

Anne McLaughlin: I am very pleased to hear that the right hon. Member has given up. Feel free to intervene again. *[Interruption.]* I will say that, from a sedentary position, he says that there are none so blind as those who will not see.

Sir John Hayes: I was quoting scripture.

Anne McLaughlin: The right hon. Member can quote scripture at me all he likes. If we are going to talk about scripture, then we are going to talk about Christianity, which is surely about compassion. To say that it does not matter that this will affect people with disabilities because there are not that many of them who will be affected is just wrong.

Sir John Hayes: I did not say that.

Anne McLaughlin: That is what he implied. Anyway, I wanted to move on to ouster clauses.

Ouster clauses put decisions beyond the reach of the court. Despite the Government backing down after an outcry on proposals to include them in the Bill, they said:

"it is expected that the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation."

[Anne McLaughlin]

I agree with Amnesty's proposition that the Government are explicitly using it as a test run for ouster clauses, and that it is a blatant and disturbing attempt to get rid of judicial oversight in other policy areas. As it also says, "The desire to get rid of judicial oversight in any area should be of the utmost concern to those who care about the rule of law and separation of powers."

I suggest that we heed the warning of the Law Society of England and Wales that, "It is important to caution that ouster clauses have the effect of reducing legal accountability and preventing individuals who have been adversely affected from being able to secure a remedy." They do not say anywhere, but there are not many of them, so let us not worry about it.

Judicial review may be inconvenient for the Government at times, but that is no justification for its removal. The implications of the Bill could be far-reaching, given the legal framework and its potential future use. The Bingham Centre for the Rule of Law, which I hope Members respect, said, "it is reasonable to say that ouster clauses are at odds with the rule of law."

Finally, last week, in reference to the now former MP about whom the Standards Committee produced a report—I think all Members know what I am talking about—the Leader of the House said:

"It is not for me to judge him—others have done that—but was the process a fair one?"—[*Official Report*, 3 November 2021; Vol. 702, c. 938.]

That is the crux of judicial review. If the Government believe that we do not need access to Cart judicial review, did those who used it to win and get justice—such as the Venezuelan man fleeing for his life, the child requiring lifesaving treatment or the family who could finally be together—not require it, or were they not worth it?

Nick Fletcher (Don Valley) (Con): It is a pleasure to serve under your chairmanship, Mr Rosindell. I will speak briefly about Brexit, which, as we know, happened a couple of years ago. After speaking to many constituents, one of the main reasons that they voted for Brexit was immigration and control of the borders. It is still a huge topic when I go door to door every week to speak to my constituents. Having got Brexit done, the Government said that they would do everything in their power to take control of the borders. This important Bill is part of that. Opposition Members should remember that, although they oppose the Bill, many of their voters agree with it. It is important to get it through.

Anne McLaughlin: Does the hon. Member think that politicians and political parties should slavishly follow public opinion, or that they should propose their own values and principles, based on human rights, and seek to take people with them and change public opinion?

Nick Fletcher: The Government, and we as MPs, should listen to our electorate. I believe the Government are doing that. I understand that it is an extremely complicated subject, but I am afraid that when my voters see planes full of convicted criminals get last-minute reprieves and are taken off those planes, they lose faith in this place, in Opposition Members and in the entire system. It costs hundreds of thousands of pounds, too. I understand and appreciate that people sometimes fall foul of the system, but we have heard that it happens between 0.22% and 5% of the time—that is what we have heard. We must look after our borders and keep them under control.

Paula Barker: We are on day three of going through the Bill. Even at day three, what I have heard from the Government Benches is purely about immigration. What would the hon. Member say to constituents of his who are looking to go through a judicial review by the court from a social justice aspect? I have heard nothing from the Government Benches regarding that—it is all about immigration and having voted to get out of Europe.

Nick Fletcher: I think the hon. Lady has heard from the Government Benches many, many times that the majority of these cases are about immigration. When Labour Members have been asked how many bites at the cherry they want, we have never once had an answer. Would she like to come back on that? I assume not.

Andy Slaughter: If the hon. Gentleman is seeking an intervention, I will provide him with one. The hon. Member for Ipswich said that Cart cases were a small number of cases, and even if they were justifiable, mistakes happen. I do not agree with that, but he made the point. I think, with respect, that the hon. Member for Don Valley is saying that it would be a good thing if cases that were unlawful were covered by the ouster, which is about preventing judicial scrutiny. In Cart cases, whether free, 7% or 5%, those cases were unlawful. It is not that we are not prepared to put the resource in and do not believe we should prioritise that type of case. I want to be clear about this. Is he saying that it is good if we introduce the ouster in Cart because that will mean that cases where an unlawful act has taken place will still not be decided and that deportation, or whatever he wishes to see, will happen, contrary to law? From the once party of law and order, that does not sound right to me.

Nick Fletcher: I thank the hon. Gentleman for his intervention but I believe, in all fairness, that he has reiterated what I said before, and my reply would be exactly the same. How many times do we have to keep coming back to this? It is the same thing. It is about the majority of immigration cases. We seem to be batting back and forth with this, but Opposition Members are not coming up with the answers that I am asking for, either.

Sir John Hayes: The reforms that we are arguing for are to restore the system that prevailed throughout the lifetime of the previous Labour Government. This change happened in 2011. If Opposition Members are so exercised about the need for the system to be as has prevailed in the past few years, why did they do nothing about it in the long period they had in government, when they presumably felt that the system that we are now trying to restore was perfectly adequate?

Nick Fletcher: I thank my right hon. Friend for that, but I want to move on because I am conscious of time.

I do understand that these people that are coming over here are leaving places that are in a terrible state and what they are leaving is sometimes awful, and I do have full sympathy for that, but there is a legal way of

entering this country, and I believe that everyone should take the legal way into this country. When people get into these small dinghies they know they are entering our country illegally. If they are entering our country illegally, then they must have to deal with the consequences that go with that.

Anne McLaughlin: On a point of order, Mr Rosindell. I am sorry to interrupt the hon. Gentleman, but is this within the scope of the Bill? This is not a Bill about borders or preventing people from coming in.

The Chair: I think we will let the hon. Gentleman carry on.

Nick Fletcher: I have almost finished anyway. If I keep being intervened on, it might take a little longer. My argument is that if people are coming into this country on their dinghies and entering illegally, then they will be dealt with through the system, and I do not believe that they should have a third bite at the cherry. That is all I am trying to say.

11 am

It was mentioned that it has taken 180 days for a High Court judge to deal with this. The amount of backlog in the system is really not helping. We need to bring it to a close. The same people tell me they want their MP to sort out fly-tipping, antisocial behaviour and all low-level crime. While Members are dealing with these issues, we are not dealing with the things that affect our constituents on a daily basis. We must always remember in this place that we work for the people who vote for us. I will do everything I can while I am in this position to listen and help them live a good, safe life.

James Cartlidge: It is a pleasure to wind up this stand part debate, which has been passionate. We have had some excellent speeches and interventions from both sides, and I will refer briefly to a few of them. The hon. Member for Lewisham East said that we are talking about human beings. We have heard cases that all of us would be sympathetic to, but that is not the point. Those using all the other parts of the legal system, where it is absolutely standard to have "two bites at the cherry", are human beings too.

If there is a planning case, for example, where some houses are approved and your parish disagrees, it can seek judicial review through the High Court. If that is denied, it can potentially—although it is unlikely—try the Court of Appeal. That is it: two bites. That is the standard procedure, and it will still apply for cases of immigration and asylum, including all the people we have heard. As to what would happen to those who were successful, that is where we have to make a judgment on proportionality and accept that there would potentially be some cases that would have been found to be unlawful. However, as my hon. Friend the Member for Ipswich said in an excellent speech, where do you draw the line?

The Labour Front-Bench spokesman, the hon. Member for Hammersmith, quoted Professor Feldman in aid, but it was Professor Feldman himself who admitted that ultimately when we look at it—he took a very balanced view—this was a disproportionate use of resource, where 96.6% of cases are proving to be unsuccessful. When the rate of failure is so high, I wonder why legal representatives are advising their clients to go down that path. It calls into question whether it is, in effect, another route of appeal, and a chance to extend the case further, because, as I said earlier, it can be in the system for up to three months.

Andy Slaughter: I think the Minister makes my point for me. I deliberately quoted Professor Feldman because, yes, he did see some merit in the proposals of Cart, but he went on to warn about the wider dangers—the series of quotes that I gave was on this point, which I am sure the Minister will address—of opening the door to a much wider and further restriction through the use of ouster in future.

On the cherry point, the argument I put forward was that an unlawful decision of the first-tier tribunal is not being picked up by the upper tribunal—hence the illegality and hence the deportation, or whatever it is, happening contrary to the law—and is being picked up through Cart. It is the first bite at the cherry. It is correcting an error at first instance, which has not been picked up by the upper tribunal.

James Cartlidge: The hon. Gentleman has been asked repeatedly whether he thinks, on that basis, that we should extend the right to three bites at the cherry to all other areas of law. What would be the cost? How much more resource would that take up? If he does not think that, he must be saying to all our constituents that immigration and asylum are exceptional, and overwhelmingly that immigration cases should have that additional right. I think our constituents would disagree. It is right for the Government to exercise judgment on matters of the use of resources.

Sir John Hayes: This is precisely the point I made when I intervened on the hon. Member for Glasgow North East. What are the parameters? What are the limits? Where is the line drawn? We have heard none of that from any of the critics of the Bill and the Government are simply trying to re-establish the parameters that prevailed for most of time, which give the system integrity and substance, and which make it not only workable but defensible.

James Cartlidge: I am grateful to my right hon. Friend. I want to correct one point about what happened under previous Labour Governments. It is quite extraordinary that the hon. Member for Hammersmith talks about this tightly drafted ouster clause somehow being a precursor to further ouster clauses that could go much wider. As I said on Second Reading, the Minister responsible for Labour's Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the right hon. Member for Tottenham (Mr Lammy), admitted in this sort of Committee sitting that they were trying to bring in the mother of all ouster clauses, so widely was it drafted. To be clear, it was not the same system. It was not the upper tribunal. There was a single-tier immigration and asylum tribunal. Judicial review was in that sense the second tier. They were going to remove it even where they did not have the upper tribunal in place. That is an extraordinary situation and it underlines that what we are restoring is a situation wholly consistent with the European convention on human rights.

Andy Slaughter *rose—*

Sir John Hayes *rose—*

James Cartlidge: I will take one more intervention from the Opposition, and then another from my right hon. Friend.

Andy Slaughter: I am not going to speak for my right hon. Friend the Member for Tottenham, who is better able to speak for himself. Let us imagine that the Minister was correct, and that that was an error. Why have the Government not learned from that? Why are they coming here to make the same mistake again, in the same terms?

James Cartlidge: The hon. Gentleman does not want to answer, because he knows he cannot defend it. He cannot answer the point. If he thinks it right that in order to find these few cases of legal merit, someone should have three bites at the cherry, why does he not apply that to all other areas of law? He either thinks it should be applied, in which case, clearly, we would be gumming up the courts with a much greater burden of pressure, which would make clearing the backlog completely impossible; or he thinks that immigration and asylum is an exception. You cannot have it both ways.

Andy Slaughter *rose—*

James Cartlidge: I am not giving way to the hon. Gentleman again. I give way to my right hon. Friend.

Sir John Hayes: I want to emphasise what the Minister is saying. He is going much further than I did. I was giving the Opposition too much credit—saying that we simply wanted to return to a system that prevailed before 2011. The Minister has told us, revealingly, that the Labour Government wanted to restrict the system further. They wanted to do more than this Bill does. Frankly, on that basis, the Opposition case seems to fall at the first hurdle.

James Cartlidge: My right hon. Friend is absolutely right. Let us be clear: the Labour party can take up as many positions as they want on ouster clauses, supporting them when in government, opposing them now, but a High Court judge cannot sit and listen to two cases at the same time. That is a fact. The question of resource is fundamental.

I want to return to the point about backlog. My hon. Friend the Member for Ipswich made an absolutely correct point. Of course this matters in the context of backlog—it is absolutely absurd to suggest otherwise. I have asked the senior judiciary about the backlog and the pressure points for capacity. Of course, there is a pressure point in terms of judicial resource, when we look at the limited number of very experienced High Court judges and so on. It is by definition a limited resource. I asked where we will find, for example, the judges to take murder cases. They will come from High Court judges. It may not be a judge that sits in the administrative court on this sort of appeal—it may not be someone who sits on a Cart JR—but it could be. The resource has to come from somewhere and more pressure on the courts, with hundreds of cases a year for something where the chance of success is so low, completely undermines our ability to deal with other serious cases. I am bound to point out that the Opposition voted on Second Reading against the entire Bill, which includes many other measures that reduce the pressure on the Crown court, as we shall hear later.

It is absolutely outrageous for the hon. Member for Hammersmith to bring in rape. It is totally indefensible for him to do so. He knows full well that in the wake of these terrible murders, all the focus of the Government and people across the country is on the great anxiety felt by women and girls about what is happening. We all share that. We all sympathise with the families who were hit by those tragedies. That is why we have measures in place across the board. We have published the End-to-End Rape Review precisely to increase the number of cases that the police choose to take forward, that the Crown Prosecution Service chooses to prosecute and which end up in court. That is the whole point of the review.

The key point is: a rape case is indictable. Where will it be heard? In the Crown court. In the Bill we have clause 10, which moves more cases from the Crown court to the magistrates so that we can free up 400 sitting days. That is a huge amount: 180 plus 400 is 580 sitting days. That is a lot of resource, so it does matter. I am sorry, but it is wholly unacceptable to conflate the two points.

Our constituents understand the basic point, as mentioned by my hon. Friend the Member for Ipswich, that gumming up the courts with immigration cases with very low chances of success using a right not available to most of our other constituents through other forms of justice will have an impact on the backlog. They know that the right thing to do is to remove this route of judicial review. That is why I urge my colleagues, with the huge amount of common sense that exists under my merry band of Committee members, to vote for clause 2, so that we streamline justice in a way that is fair and equitable for all people in the justice system. The clause would ensure that we have proportionate use of resource so that we can bear down on the backlog. I urge colleagues to support clause 2.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 7.

Division No. 5]

AYES

Cartlidge, James	Johnson, Dr Caroline
Fletcher, Nick	Longhi, Marco
Hayes, rh Sir John	Mann, Scott
Higginbotham, Antony	Marson, Julie
Hunt, Tom	Moore, Damien

NOES

Barker, Paula	McLaughlin, Anne
Crawley, Angela	Slaughter, Andy
Cunningham, Alex	
Daby, Janet	Twist, Liz

Question accordingly agreed to.

Clause 2 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned.—*(Scott Mann.)*

11.12 am

Adjourned till this day at Two o'clock.