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Public Bill Committee

JUDICIAL REVIEW AND COURTS BILL

Eleventh Sitting

Tuesday 23 November 2021

(Afternoon)

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Saturday 27 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 23 November 2021

[Andrew Rosindell *in the Chair*]

Judicial Review and Courts Bill

Clause 47

Commencement and transitional provision

2 pm

The Chair: We resume with clause 47 and amendment 30. I would like to be able to call Anne McLaughlin, but she is not here.

The Parliamentary Under-Secretary of State for Justice (James Cartlidge): On a point of order, Mr Rosindell. On behalf of all colleagues, may I say how grateful we are that you allowed us to attend the funeral this morning, instead of sitting in Committee? I thought it was a profoundly moving occasion, and your words were very moving in particular. It showed Parliament at its best.

I just said to the Doorkeepers that I thought the moment when they walked behind the coffin was one of the most moving I have seen as an MP. I thought it appropriate to put on record my thanks for the adjournment this morning, and that we all dearly miss our great friend. It was a very fitting and beautiful service.

The Chair: I thank the Minister for his comments on a very sad day for us all.

Sir John Hayes (South Holland and The Deepings) (Con): Further to that point of order, Mr Rosindell. I do not want to prolong our proceedings unduly, but I think it is important to amplify the Minister's remarks. Without wishing to embarrass you, you were a very close friend of Sir David. We were all his friends, but you were particularly close to him. We are grateful for your being here this afternoon, and I think we would all agree that it was a fitting final farewell to a much-valued parliamentarian, a dear friend and, most importantly, a husband and father.

Marco Longhi (Dudley North) (Con): Further to that point of order, Mr Rosindell. I echo the previous comments. As a member of the new intake, I had the good fortune of having an office on the same floor as Sir David Amess in 1 Parliament Street. As the lift doors open, his office door is immediately in front. It has been a terrible sadness, as you can well imagine, every time I have seen that door with a candle lit in front of it in recent days and weeks.

As a colleague and a fellow Catholic, I felt today's mass and funeral celebrations were a very fitting goodbye to someone I did not really get to know that well but someone who, as an elder statesman who had been round the block a few times, if I can put it that way, made me feel very welcome. He made a point of coming to say, "Hello. Who are you? Where are you from?" in his indescribable, unique way.

Tom Hunt (Ipswich) (Con): Further to that point of order, Mr Rosindell. Extending on that theme, I was also very honoured to be at Westminster Cathedral this morning. I know how close you were to the late Sir David, and I am lucky to class you as a close friend of mine.

Sir David was somebody who was very visible in the Chamber. I remember in my first few weeks after being elected that I wanted to figure out how to do the job effectively, and I went around to canvass some names of people I should talk to about how to do the job effectively as a constituency MP. Sir David's name came up almost as many times, and perhaps more times, than yours, Mr Rosindell. He was incredibly characterful, and I will always remember the summer and Christmas Adjournment debates when he would fire off 30 or 40 points within two or three minutes, when I would have mentioned barely one or two. It is with some sadness, though, that I say that he was somebody whom I always assumed I would meet and get to know very well, but that I was not given that opportunity. Like my hon. Friend the Member for Dudley North, who is a fellow Catholic, I was very moved by the incredibly powerful mass. I was lucky enough to take communion today—I have had my first holy communion and Father Pat has been trying to get me to have a confirmation: he is keeping his eye on me. It was incredibly moving today, and it might have done the job. I think that I will do that.

Andy Slaughter (Hammersmith) (Lab): Further to that point of order, Mr Rosindell. May I associate the Labour party with the remarks of the Minister and Conservative Members about Sir David? I commiserate with the Members of the 2019 intake—because of covid, they probably did not get a chance to know him. But they would have got to know him pretty quickly, with us all being back here. As somebody from a very different political tradition, I worked very closely with him for the last five years through his chairmanship of all-party parliamentary fire safety and rescue group, which was astonishing. We all know that all-party parliamentary groups have a multitude of successes and failures. That was an astonishingly powerful and well-organised body, particularly in the wake of Grenfell. It really was a pleasure not only to know him but to see how effective he was as an operator in Parliament. We will all miss him. I know that you will particularly, Mr Rosindell, as a friend. We will all miss him as a friend, a colleague and a wonderful parliamentarian.

The Chair: Thank you all very much for those words. I hope that we might send a copy of the report of these remarks to Lady Amess and the family, so that they are aware of some of the kind words that have been spoken this afternoon about Sir David, who, as many have commented, was a very dear friend to me and to many in this room. I am only sorry that some were not able to get to know him as well as I knew him, because he was somebody very special—a fantastic Member of Parliament, a fine constituency MP and a very dear friend to so many. I thank you all for your very kind words this afternoon.

Fortunately, Anne McLaughlin is now with us, so we can move to clause 47 and amendment 30.

Anne McLaughlin (Glasgow North East) (SNP): I beg to move amendment 30, in clause 47, page 54, line 34, at end insert—

"(7) Notwithstanding the provisions above, this Act shall not come into force until the Lord Chancellor has laid before Parliament a written statement confirming that no provision in this Act contravenes Article 6 or Article 13 of the European Convention on Human Rights.

(8) The statement under subsection (7) must be laid before Parliament within three months of this Act being passed."

This amendment would prevent any Act resulting from this Bill from coming into force until the Lord Chancellor confirms, via a written statement to Parliament, that none of its provisions contravene ECHR Article 6 (right to fair trial) or ECHR Article 13 (right to effective remedy).

I thank everybody on the Committee for their forbearance during the last week, while I was struggling to move, and today, when I underestimated how long a usually seven-minute walk to get here would take me. Thankfully, I have an X-ray on Thursday, and I hope that something will come of that.

May I also associate myself and my hon. Friend the Member for Lanark and Hamilton East with the remarks on Sir David Amess? I did not know him; I knew exactly who he was, though. There was that smile that made him stand out—a really genuine smile that reached his eyes. I always noticed that. I did not know him personally, but listening to people speak about him, including many people in the SNP group, who knew him really well and are really hurting, makes me wish that I had. Maybe that can teach us something in this place: that there are people who we can identify with and befriend who have different views from our own. Thank you for allowing me to say that.

I sure that Conservative Members and Opposition Members will agree with the fundamental principles that we should all be afforded the right to a fair trial and effective remedy. There can be little dispute that those are the cornerstones of a justice system that respects the rule of law and principles of natural justice. Amendment 30 seeks confirmation from the Lord Chancellor that any provision in the Bill will be prevented from coming into force if it contravenes article 6 or article 13 of the European convention on human rights: the right to a fair trial and the right to an effective remedy.

We have already debated how provisions in the Bill, such as the presumption for using prospective-only quashing orders, could risk breaching article 6.1 of the European convention on human rights on the right to a fair trial, which requires an effective judicial remedy. The amendment would ensure the Government had the opportunity to make cast-iron guarantees that that will not happen. That would be expressed via a written statement from the Lord Chancellor, laid before Parliament within three months of the Bill being passed.

The Minister may wish to point out that article 13 does not apply to the Human Rights Act 1998, but it could be applicable in the European Court of Human Rights in Strasbourg and that is why we felt it appropriate to include it in the amendment. Strasbourg does not recognise the practice of failing to give human rights without an effective remedy. Rather than stripping away rights, the Government should consider in any proposed review of the Human Rights Act that the right to effective remedy be added. As the Minister has assured us that the Bill will furnish the courts with a broader set of tools, with no risk of restricting individual claimants' rights, he will surely consider the amendment a gift from me to him to help clarify his position.

James Cartlidge: Thank you for your generosity in allowing us to pay our tribute, Mr Rosindell, following this morning's very moving mass at Westminster Cathedral.

The amendment would prevent any measure in the Bill from coming into force until the Lord Chancellor has provided a written statement to say that no provision in the subsequent Act contravenes article 6 on the right to a fair hearing and article 13 on the right to effective remedy of the European convention on human rights. I assure hon. Members that none of the measures in the Bill contravenes either article 6 or article 13.

The hon. Member for Glasgow North East mentioned remedies. We have the new remedies relating to quashing orders, which are a key part of how the Bill improves judicial review. In clause 1, there are adequate safeguards to ensure that any individual exercise of the new remedial discretions provides an effective remedy in cases concerning violations of convention rights. That is because the measures do not limit the availability of any existing right for such a breach and their use remains open to the court's discretion. Presumption in favour of any of the remedial discretions only operates in circumstances where its exercise would

"offer adequate redress in relation to the relevant defect"

and it may be rebutted where there is good reason to do so. Further, the court is required to consider the interests or expectations of persons who would benefit from quashing of the impugned Act, as well as considering other factors.

On clause 2, regarding Cart judicial review, our position is that article 6 does not require a further right of judicial review in relation to decisions concerning permission to appeal from the first-tier tribunal to the upper tribunal and therefore considers that the measure does not interfere with an individual's right under article 6.

When the Bill was introduced, the Lord Chancellor at the time signed a statement under section 19(1)(a) of the Human Rights Act 1998 to confirm his view that the provisions in the Bill are compatible with the convention rights. When the Bill passes to the other place, a second statement will be made, as required under section 19, taking into account any amendments. Should any Government or non-Government amendments be made that we felt contravened those statements, we would inform Parliament. It would be a breach of the ministerial code to proceed towards Royal Assent without either amending the provisions or informing Parliament of the issue.

In addition, ahead of introducing the Bill, the Government carried out a full ECHR analysis and published a memo for the Joint Committee on Human Rights setting out that analysis on parliament.uk. The previous Lord Chancellor wrote to the Committee's Chair when the Bill was introduced and we will engage with the Committee fully should it choose to publish a report on the Bill. In summary, the Bill currently does not contravene either article 6 or article 13, and appropriate measures are in place should that no longer be the case at any point during its passage. I therefore urge the hon. Lady to withdraw the amendment.

Anne McLaughlin: In the light of what the Minister has said about the potential breach of the ministerial code, and knowing how seriously almost everyone takes that, I hope that what he tells me is correct. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

2.15 pm

Anne McLaughlin: I beg to move amendment 31, in clause 47, page 54, line 34, at end insert—

"(7) Notwithstanding the provisions above, nothing in this Act relating to Scotland shall come into force without a consenting resolution being passed by the Scottish Parliament."

This amendment would require the consent of the Scottish Parliament to be given to any provisions in the Bill that relate to Scotland for those provisions to come into force.

As I am sure the Minister is aware, under the Sewel convention the Scottish Parliament should have the final say over any attempt by the UK Parliament to legislate in devolved areas. In recognition of the separate and distinct nature of Scotland's legal system, article 19 of the Treaty of Union protects the authority and privileges of Scotland's Court of Session. This is a fundamental part of the UK constitution and this amendment would ensure that the UK Government respect the principles of the Sewel convention and the constitutional arrangements.

Without an amendment specifically guaranteeing the requirement of consent from the Scottish Parliament to any provisions in the Bill that relate to Scotland, we risk interference with Scottish legal processes. The Faculty of Advocates, which was represented at the evidence sessions of this Committee, has said that in Scotland

"judicial review does not suffer from a lack of clarity, and any attempt to codify it is likely to undermine the very flexibility that renders it effective."

Furthermore, Liberty has also commented on the situation and has said that

"the Act of Union does not serve to enable the UK Government to reshape the jurisdiction of the Court of Session. These are not technical or procedural points. In any event, the administration of the courts and the justice system in Scotland clearly falls within devolved competence."

I am certain the Minister and Members opposite will be aware that this amendment is not only a reminder that this convention exists, but that it too must be respected in statute.

James Cartlidge: The amendment would require the consent of the Scottish Parliament to be given to any provisions in the Bill that relate to Scotland. I am emboldened to say that the word "relate" is in bold in my text, as that word is very important. I have a number of constitutional concerns about the amendment.

To reassure the hon. Members for Glasgow North East and for Lanark and Hamilton East, the measures in this Bill relate wholly to reserved matters. Ministers and officials have been engaging with the devolved Administrations over the course of the Bill, and we will continue to do so when the provisions in the Bill come into force.

I believe we are in agreement that chapter 2, "Online procedure," and chapter 3, "Employment tribunals and the Employment Appeal Tribunal," of the Bill relate to matters outside the competence of the Scottish Parliament. Yet this amendment would still apply to the clauses in those chapters and require the consent of the Scottish Parliament before they could come into force.

The majority of the criminal procedure measures also relate only to England and Wales, although, as I have previously noted in Committee, we are aware that the Scottish Government's position may be that the new automatic online procedure, introduced by clause 3, engages the legislative consent process. Furthermore, we believe that this is outside the competence of the Scottish Parliament, which, in the Government's view, does not engage the legislative consent process.

With regard to removing Cart JR, I should make clear that the unified tribunal system is a reserved matter, where it relates to matters of reserved policy. Our measures on Cart will apply to the whole of the UK, but only in respect to the matters heard in that tribunal system that fall outside the competence of the Scottish Parliament. The provisions relating to remedies apply to England and Wales only.

If it came into force, the amendment would actually lead to decisions in reserved areas operating differently across the UK, thereby reducing the clarity the Bill currently provides. In line with the memorandum of understanding on devolution, we will continue to engage with the devolved Administration at a ministerial and official level to ensure that we have time to fully understand any implications for the Scottish court system.

On that basis, I cannot accept this amendment and I urge the hon. Lady to withdraw it.

Anne McLaughlin: I am not sure what I am supposed to say, but I do not wish to withdraw the amendment.

Question put, That the amendment be made.

Question negatived.

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

James Cartlidge: This is one of those long ones, Mr Rosindell. This clause sets out when the measures will come into force. While some measures will come into force two months from when the Act is passed, including the coroner's provisions and two of the criminal provisions, in clauses 14 and 15 and schedule 1, the remainder of the Bill will come into force by regulation.

Question put and agreed to.

Clause 47 accordingly ordered to stand part of the Bill.

Clause 48

SHORT TITLE

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

James Cartlidge: I just need to check I have enough water for this one. The clause is the short title of the Bill.

Question put and agreed to.

Clause 48 accordingly ordered to stand part of the Bill.

The Chair: We now come to new clauses. I understand that the Opposition do not intend to press new clauses 1 and 2, which have already been debated, to a Division, so we will begin with new clause 3.

New Clause 3

EXCLUSION OF REVIEW OF THE INVESTIGATORY POWERS TRIBUNAL

(1) Section 67 of the Regulation of Investigatory Powers Act 2000 is amended as follows.

(2) Leave out subsection (8) and insert—

"(8) Subject to section 67A and subsections (9) and (10), determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether the Tribunal has jurisdiction and purported determinations, awards, orders and other decisions) shall be final and shall not be subject to appeal or be liable to be questioned in any court.

(9) In particular—

(a) the Tribunal is not to be regarded as having exceeded its powers by reason of any error of fact or law made in reaching any decision; and

(b) the supervisory jurisdiction of the courts does not extend to, and no application or petition for judicial review may be made or brought in relation to, any decision of the Tribunal.

(10) Subsections (8) and (9) do not apply so far as the decision involves or gives rise to any question as to whether the Tribunal—

(a) has a valid case before it;

(b) is or was properly constituted for the purpose of dealing with the case; and

(c) is acting or has acted in bad faith, with actual bias or corruption or in some other way that constitutes a fundamental procedural defect.

(11) No error of fact or law made by the Tribunal in reaching any decision is to be construed as relevant to the question."

(3) The amendment made by subsection (2) applies to determinations, awards, orders and other decisions of the Tribunal (including purported determinations, awards, orders and other decisions) made before the day on which this section comes into force."—*(Sir John Hayes.)*

Brought up, and read the First time.

Sir John Hayes: I beg to move that the clause be read a Second time.

The new clause addresses the issue of the courts' role in curtailing the use of the Regulation of Investigatory Powers Act 2000 and more especially circumventing the role of the Investigatory Powers Tribunal. It would restore Parliament's choice in enacting section 67 of the Act so that the decisions of the Investigatory Powers Tribunal would not be subject to judicial review.

As Security Minister at the Home Office, I addressed these matters in an important piece of legislation that established the principle of a double lock in respect of the warranting of powers in the case of both suspected terrorists and serious and organised criminals. That is to say that tech companies are obliged to maintain a record of electronic communications that can be interrogated on application to the Home Secretary for a warrant. I introduced the double lock, so that as well as satisfying the Home Secretary of the validity of the case made by the police or the security services, a warrant must also pass the same test when put before a member of the Investigatory Powers Tribunal or a judge. That was a safeguard to ensure that those powers are used only when necessary and proportionate. It is that test of necessity and proportionality that lies at the heart of the exercise of powers in respect of security and related matters.

The problem—it is a challenge that we have considered on previous occasions in the scrutiny of the Bill: indeed, it has punctuated our consideration—is that the courts have taken it upon themselves to become involved in matters that should be the exclusive preserve of this House. It is very important to see the Bill in that context. The supremacy of Parliament is fundamental to protecting the interests of the people, and Parliament's particular role in our constitutional settlement is not a matter—as was suggested by one of those who gave evidence to us—of mutuality.

Anybody who understands constitutional theory and practice will know of the work of A. V. Dicey. It is clear that parliamentary sovereignty, as Dicey argued, confers on Parliament a dominant characteristic. Parliament consists of Her Majesty the Queen, the House of Lords and the House of Commons acting together, and therefore:

"The principle of Parliamentary sovereignty means neither more nor less than this".

In Dicey's words, Parliament has

"the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament."

Those are the words of A. V. Dicey in affirming the principle of sovereignty. He goes on to say that parliamentary sovereignty must be thus described:

"Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies existing law, will be obeyed by the courts…Some apparent exceptions to this rule no doubt suggest themselves. But these apparent exceptions, as where, for example, the Judges of the High Court of Justice make rules of court repealing Parliamentary enactments, are resolvable into cases in which Parliament either directly or indirectly sanctions subordinate legislation."

Legally, sovereign power is assuredly maintained by Parliament. It is quite wrong for the courts to be used as a way to perpetuate debate. We heard that from the Minister in particular respect of the way that judicial review has metamorphosised over time to perpetuate debate in particular cases that have been settled previously. The Minister described it as having several bites of the cherry. That is not the role of judicial process, and the Bill goes a considerable way to addressing that, but it does not go far enough.

The purpose of the new clause is to probe and press the Minister—I will not put it more strongly than that—to go further in affirming the sovereign role of Parliament described by A. V. Dicey. The power of Parliament has been drawn into question, particularly in respect of the Investigatory Powers Tribunal, as I said. The Supreme Court, in a perverse judgment, effectively set aside Parliament's lawmaking choice in May 2019 in the landmark judgment of Privacy International *v.* Investigatory Powers Tribunal. Hon. Members will remember that the case was raised in the first oral evidence session by Professor Ekins, and addressed by him in his paper for Policy Exchange. I once again thank Policy Exchange for publishing that paper, which has added to our understanding of and insight into these matters.

In essence, the new clause, tabled in my name and that of my hon. Friend the Member for Ipswich, and supported by other Committee members—I say that with some timidity and hesitation, because I cannot presuppose that support until I have persuaded them by the power of my oratory; none the less, I am confident

[Sir John Hayes]

that it has some sympathy of other Committee members—is an opportunity for the Government to do what the Attorney General recommended in her recent speech in Cambridge, in which she identified the problem I describe of the courts taking a more incursive role into the business of high politics than is their proper place to do. The new clause, in respect of the Regulation of Investigatory Powers Act 2000, attempts to do just that.

The new clause would reverse the Supreme Court's judgment and reinstate the law that Parliament clearly made. Before the Privacy International case, the courts had taken section 67 of the 2000 Act to be a clear, unambiguous ouster clause that excludes the jurisdiction of the courts in relation to the Investigatory Powers Tribunal. For 19 years, there has been no possibility of judicial review. In recent court judgments, including others such as the Adams case and the Miller case, we have seen the creeping role of the courts into those areas, with judicial review being used as the mechanism to allow that mission creep. It is important that the Government recognise that—from what the Minister has said, I think they do—and take effective action to address it.

2.30 pm

I suppose what I am saying is that the Bill could have been a bigger piece of legislation. As you will know from your long experience in the House, Mr Rosindell, new clauses are sometimes a way of encouraging the Government during the further consideration of a Bill to listen to the arguments that have been made during scrutiny and to allow it to do more than was originally intended. The alternative would be to bring in another Bill, but it is always difficult to secure time in the legislative programme. The likelihood of another Bill in the same subject area is small, so this may be our chance. It is a rare and special chance for the Minister to become something of a star, if I might put it that way, in the battle to affirm the constitutional place and historic role of Parliament in relation to the courts.

The then Lord Chancellor, my right hon. and learned Friend the Member for South Swindon (Robert Buckland), made a powerful critique of the Privacy International judgment and of the 2015 Evans judgment, which concerned the disclosure of the Prince of Wales's letters, which was a similar case of the courts taking unusual—I would say exceptional—power with an undesirable outcome. In the Evans case, a Supreme Court majority effectively overturned part of the Freedom of Information Act 2000.

The constitutional problems with the Supreme Court's reasoning in that case are set out in a previous Policy Exchange paper written by Professor Ekins and Professor Forsyth of the University of Cambridge. Their argument was strongly endorsed by Lord Hoffmann and Lord Brown, two of the country's most senior judges, and by Lord Faulkes, who chaired the independent review of administrative law last year.

Speaking about that case, the then Lord Chancellor said:

"when enacting the provisions at issue in Privacy International and Evans Parliament did not believe that it was infringing the rule of law (and indeed the judges in the minority in both cases agreed). It was also perfectly clear, as the minority recognised, what Parliament actually intended. Provided Parliament's assessment was not wholly unreasonable, it does not appear to me to be right to frustrate that intention".

That is a powerful critique. Even if Parliament had been wrong to enact section 67(8) of the Regulation of Investigatory Powers Act 2000, it was a decision for Parliament to make.

A fundamental issue is at stake here. We are answerable to the people and our legitimacy is derived from the people. Although it is important that an independent judiciary plays its part in our constitutional settlement, it is not a matter of reciprocity or mutuality; it is not about alternative sources of power. This place is the source of legitimate democratic power because we, as I say, draw that authority from the people. We speak for the people and are answerable to the people. That is the point. It is not right for that mission creep to allow others to exercise power, who are not directly accountable in the way that I have described.

The new clause focuses on the important Privacy International case, but it also speaks to those other wider and deeper matters. By accepting the new clause, as I am confident the Minister will with good grace and alacrity when he rises to speak, the Government will be doing a great service not only in their own interests, because the new clause is entirely in keeping with the essence of the legislation's intention, but in recognising that the Bill provides a special, unusual, perhaps even a unique opportunity to right these wrongs.

Without wishing to delay the Committee further, I say to my colleagues on the Conservative Benches and, by the way, to those across the House, that the Bill has been debated in good spirit, and with appropriate care. I paid tribute in an earlier session to the hon. Member for Hammersmith, but I do not want to do so again, else we will start getting the reputation of being too friendly with each other. I do not want to give the impression that I am in the thrall of the hon. Gentleman. The Bill has been debated in the right spirit and in a sensible and positive way. To Opposition Members, I say that it is important for all Members of the House to recognise the authority of this place, as I have described, for that is our mission and purpose. I am disturbed by the increasing judicial activism that has led through series of cases—I could talk about the Miller case, and I referred briefly to the Adams case—which is changing the balance of our constitution from this place to elsewhere.

In summary, I was proud to take security legislation through the House that gave the Security Service and the police the powers that they need to protect us from those who seek to do us harm. We have put into place safeguards and protections in earlier security legislation and in the legislation that I took through myself. We are clear that there have to be those safeguards, and of course it is right that all the agencies on which we confer extensive powers are themselves accountable. But it is not right for the courts to frustrate the will of this House.

To that end, I am pleased and proud to propose the new clause in my name. Of course, needless to say, at this stage I will not say that I am going to push it to a vote; that would be quite wrong, because it would suggest that the Minister could just say anything. I do not want to let the Minister off the hook. He knows that I am a supportive and friendly member of the

Committee; but none the less, I am expecting him to at very least say that he is minded to consider these matters, or the full power of the Back-Bench Members of the Committee could be felt and heard, to the distress of my great friend who sits on the Front Bench next to the Minister, namely my hon. Friend the Member for North Cornwall. As I said to him last week, were that to happen, he would have a grey mark against him, next to my black one.

I say to the Minister, persuade me otherwise, or agree at least to consider the matters addressed by the new clause because it is very much inspired by the message that he has broadcast to the Committee: the Government want to get things right in respect of the power of courts alongside the power of Parliament.

Andy Slaughter: The right hon. Member for South Holland and The Deepings takes us back into the important constitutional territory with which he started his consideration of the Bill. He also, knowingly or not, revealed something about his taste in curry. For those who are looking slightly amiss about that, I refer to the opening paragraph of the article concerning the Bill that appeared in *The Mail on Sunday*, which said:

"The Justice Secretary, Dominic Raab, regards himself as a spicy 'Vindaloo' politician compared to the bland 'korma' represented by his predecessor, Robert Buckland, sources in his new ministry have told the Mail on Sunday.

The bizarre comparison was made in the context of the Judicial Review Bill, inherited by Mr Raab from Mr Buckland, which aims to clip the wings of the Judiciary over the extent to which they can rule on political decisions, such as Boris Johnson's suspension of Parliament during Brexit negotiations in 2019."

I will not go on, partly because the article contains some unparliamentary language, and in fairness to the Justice Secretary it ends with the immortal line:

"A source close to Mr Raab denied that he had ever compared himself to a vindaloo curry."

The right hon. Member for South Holland and The Deepings puts himself more in the vindaloo than the korma camp with his comments, but I note that the new clauses that he has tabled are a subset of those in the Policy Exchange document, to which he referred, by Professor Ekins, who was one of the witnesses who gave evidence to the Committee. That document was a very powerful concoction indeed, because it contained 20 suggested new clauses or amendments, which were whittled down to seven on the amendment paper. After excluding those that were not in scope, we are down to two.

None the less, the import of what the right hon. Gentleman intends is still there, so I will respond to new clause 3 and, in due course, to new clause 5, and say to the Minister that it would be wrong to accept the new clauses, partly because of what they say and partly because of the way they are being introduced at this stage; they should really have come through the usual processes. That is to say nothing about the right of the right hon. Gentleman to table them now to raise the issue. Nevertheless, the provisions are being put to the Committee at a very late stage. The way in which they were tabled leaves no time for substantial parliamentary engagement or the required serious consideration of their merits.

Of course, Parliament is supreme, and there may be a case for looking at the propriety of certain Supreme Court decisions or changing the way that judicial review works, but this is not the proper way to enact measures of such constitutional significance. The bottom line is that if Parliament wishes to modify or overturn legal decisions as significant as those highlighted here, it should do so through a proper and full debate, with a full consultation beforehand, so that it can benefit from a wide range of expert views. Parliamentarians should be empowered to make proper, informed decisions. These rushed provisions undermine the parliamentary process and threaten ill-considered constitutional reforms, with unknown consequences.

Sir John Hayes: On the timing, the hon. Gentleman makes a fair point. He will know how the House works; he has been in it a long time. Clearly there will be opportunities for further consideration of the matters that I have raised, both on Report and during the Bill's passage in the other place, so we are at the beginning of a very long journey.

As I said, I have not decided whether to press the new clauses to a vote, but I am putting down a marker. The hon. Gentleman will have seen that happen many times; indeed, he has done the same during scrutiny of the Bill, and I hope that some of his arguments will be heard. On the character of the marker, the new clause respects new clause 2 in terms of exceptional cases where the tribunal has acted in a perverse way, so it allows legal consideration of any exceptional, ambiguous or improper decision by the tribunal.

Andy Slaughter: I am grateful to the right hon. Gentleman, who made several points there. I am coming on to deal with each of them. I suspect that his new clauses and comments are directed as much—if not more—to his own Front Benchers as to me in putting that marker down, but the Government must have taken some care with the long title of the Bill, which is tightly drawn.

Obviously, I do not question the wisdom of the Clerks, but the two new clauses we are debating this afternoon have squeaked through because the long title clearly identifies what is in clauses 1 and 2. With all respect to the other place, and there are more stages still to go, it is not just the deliberation in both Houses that is important when discussing constitutional matters.

2.45 pm

We heard from some, but only some, of the experts in the field. I concede there was a significant consultation process; perhaps the Government did not get the responses they wanted the first time, so they went back and had another go. Nevertheless, they have had at least two bites of the cherry in the consultation.

James Cartlidge: Ah! That'll do.

Andy Slaughter: That is enough, apparently—according to the Minister.

Having gone through that process, the Government decided to push forward with focused reforms to Cart judicial reviews to modify the nature of discretionary remedies only. This new clause, and indeed new clause 5 and the other new clauses that were not selected, would go much further. If these proposals were being taken seriously, they would be headline provisions in the Bill, not underdeveloped addendum clauses introduced without

[Andy Slaughter]

proper consideration and in their current form. It is inappropriate to being these measures into force as proposed.

The new clauses are not supported by, and in some cases go directly against, expert analysis or wider consultation. The measures being taken forward by the Government in this Bill were preceded by extensive consultation and engagement with experts and stakeholders. That includes the work of the independent review of administrative law and contributions from across the sector, including the judiciary.

The same cannot be said of these new clauses. In fact, the majority of experts and the Government themselves rejected some of the very measures they propose. For example, the changes to the disclosure duty in new clause 5 were considered but ultimately rejected by the independent review of administrative law. The Government agreed at the time that the reforms were unnecessary.

The new clauses try to address significant, complex areas of law in an overly simplistic way, and many of the apparent problems these new clauses seek to resolve are more complicated than the proposals seem to believe or understand. The rules on evidence disclosure, for example, have developed so that disclosure is tailored in each case to ensure that justice is done, whereas the new clauses take a blunt hammer to this sophisticated scheme. Unfairness is therefore inevitable.

The solutions are blunt and may lead to unintended consequences. Although several of the new clauses have been found to be out of scope, they amount to an attack on our constitutional balance. The result would be a great reduction in judicial protection, the disempowerment of aggrieved citizens and a Government who are unacceptably insulated from scrutiny.

Dr Caroline Johnson (Sleaford and North Hykeham) (Con): The hon. Gentleman is talking about constitutional balance, as did my right hon. Friend the Member for South Holland and The Deepings. The important question is: who is ultimately in charge of making the laws of the country? Parliament has the right, given by the electorate, to decide the law. The principle of the judgment said that should be limited by the judiciary in some cases, which throws up an important constitutional question that we need to look at.

Andy Slaughter: Absolutely. Parliament is supreme and can will what it likes. That is very clear. Where the balance lies is what is in dispute here. The question is the appropriate role of the judiciary, which is exactly how the doctrine of judicial review has developed.

Dr Johnson: With respect, that point is not in debate. What Lord Carnwath said is:

"In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law."

What I understand is being said—the hon. Gentleman can correct me if I am wrong—is that in some cases the legislature does not have the right to pass particular laws.

Andy Slaughter: No, and even the vindaloo version—the full Ekins version—does not attack the doctrine of judicial review. It is saying that the courts sometimes resolve matters procedurally and sometimes, in relation to specific judgments, the court has got it wrong and it is Parliament's job to overrule, which Parliament is entitled to do. At the end of this legislative process, Parliament will have made those decisions. What we are debating now is what is or is not appropriate. Specifically, we are debating two discrete issues. The first is the decision in the Privacy International case against the Investigatory Powers Tribunal and whether an ouster should be imposed, and the second is about rather more widespread issues to do with disclosure and witness evidence. I am perfectly open to arguing those issues, but the point is that we happen to disagree: these measures are wrong, and that is what we are going to debate this afternoon.

Let me talk more specifically about new clause 3. The new clause would effectively overturn the decision in the Privacy International case by excluding judicial review of the Investigatory Powers Tribunal subject to a number of limited exceptions that broadly, although not exactly, mirror those in clause 2. That means that judicial review would be excluded except where the High Court must consider whether the tribunal had a valid case before it; was properly constituted to hear the case; or acted in bad faith, with actual bias, corruption or some other fundamental procedural defect.

As I have said, this would insert a second ouster clause in the Bill and would be a concerning addition to the restriction of Cart judicial reviews. The new clause includes similar exceptions—bad faith, fundamental procedural defect and so forth—to the ouster in Cart, but crucially they are even narrower than those in clause 2, in that the exception of where the court has acted

"in fundamental breach of the principles of natural justice"

has been removed. The more restrictive exception of where the court acts in a way

"that constitutes a fundamental procedural defect"

has been added. The trend suggested is extremely concerning and risks having a serious impact on the ability of individuals to retain redress, not to be subject to unlawful exercise of power, and to hold the Executive to account.

The first thing to note is that there is immediate uncertainty around those exceptions and how they might operate. There is already a problem with the Cart ouster in the main section of the Bill, and I have spoken at length about that in previous sittings. That uncertainty would only be multiplied by this new clause.

Judicial review is an essential constitutional remedy, and attempts to introduce and proliferate ouster clauses, as this new clause seeks to do, risk undermining the UK's constitutional framework and the protection against abuses of Executive power. Judicial review is generally available only where there is no other recourse to an alternative remedy. The effect of ouster clauses is therefore often to shut down all routes to challenge a decision, even if the decision has been based on a misinterpretation of the law.

Furthermore, judicial review is an integral part of the UK constitution based on parliamentary sovereignty, ensuring that there is a means to address injustices and abuses of power. It exists separately and in addition to the Executive's political accountability to Parliament.

Ouster clauses risk undermining the effectiveness of judicial review as a means of legal scrutiny of the Executive. No matter how unpopular the cause or the claimant, the rule of law still applies and the Executive should not be able to go beyond their legal limits without the potential for accountability in the courts. In fact, it is precisely for such claimants that judicial review is so crucial.

Sir John Hayes: I rise to correct the hon. Gentleman but not in an antagonistic way. He will understand that this new clause—and, indeed, the Bill—do not supersede section 67A of the Regulation of Investigatory Powers Act 2000, which does indeed say that the tribunal can be challenged on a point of law. Contrary to his argument, there remains in existing legislation an additional safeguard if the tribunal acts in a way that is contrary to proper legal practice, and a point of law is the ground for an appeal.

Andy Slaughter: I am grateful for that intervention. I will come in a few moments to the powers of the Investigatory Powers Tribunal, so let us see whether that satisfies the right hon. Gentleman.

In relation to the ouster in clause 2, I spoke about judicial review's role in ensuring good and lawful administration, but as that issue has arisen again I wish to emphasise the point in this new context. Judicial review is an incentive to maintain high standards in public administration by public bodies, because the possibility of judicial review motivates decision makers to ensure that their decisions are lawful. Ouster clauses such as this one remove such motivation and, coupled with the removal of the means through with such decisions could be challenged, risk a decrease in the quality of Executive decision making.

Decisions and guidance from the courts can also help to improve policy development and decision making in Government. Judicial review provides the opportunity to bring to light legitimate concerns about a public body's processes and decision making, and decision making in Government. Indeed, judicial review provides the opportunity to bring to light legitimate concerns about a public body's processes and decision making and then also gives guidance on improving the processes in the future and encouraging good governance.

The same applies to the Investigatory Powers Tribunal. The decisions of the Investigatory Powers Tribunal relate to potentially very significant Executive powers in the area of surveillance and privacy rights. In this context especially, the risk of a breach of the fundamental rights of individuals is high. It is therefore crucial that Parliament has sufficient time to carefully consider the consequences of restricting judicial review in this context, and this last-minute amendment does not afford that.

Fundamentally—regardless of what anyone thinks about the merits of the Privacy International case—this is not the way to go about amending it, or even thinking about amending it. Parliamentarians will be asked to vote on what is in effect a very significant legal change, without any real appreciation of the possible effects and consequences and, as above, without the benefit of expert input through consultation and parliamentary examination. A provision such as this should be the headline measure in any Bill; it should be considered and debated seriously and properly; and anyone voting on it should have a full understanding of the issues. It should not be introduced as a last-minute addendum to an otherwise unrelated set of measures concerning judicial review remedies. This new clause as drafted will generate serious uncertainty.

There is also a substantive argument here. In the Privacy International case, the Supreme Court essentially held that it is very difficult for the Government to completely close off judicial review—in this case, concerning decisions of the IPT. The Government should be very careful about reversing that decision: the immediate consequence would be to close off judicial review. If it is thought that the Privacy International decision should be revisited in the future, it should be ensured that parliamentarians are fully aware of any consequences of doing that, and perhaps some middle-ground solution that preserves access to justice could be tried.

The amendment takes a sledgehammer to what should be a carefully crafted and sensitively considered issue. That, in my submission, is not the appropriate way to do good law making.

Tom Hunt: I will keep my remarks fairly brief; I see myself very much as a secondary signatory to these amendments from my right hon. Friend the Member for South Holland and The Deepings: my much wiser, senior colleague. However, at one point last week I did think that I would be spearheading these particular amendments myself. Fate has meant that I have assumed a less significant role today.

Most of the comments that I would like to make are in relation to new clause 5, so I will hold off from making those comments now. All I will say is this. I take the point that new clause 3 is significant and Parliament needs more time to look at it. That was not the case when the change occurred after the Privacy International case. Actually, something very significant happened there. There was a major change in relation to the powers tribunal, its role and the role of judicial review in reviewing its decisions, and Parliament had no say at all in supervising that or debating it. I would be grateful if the hon. Member for Hammersmith let me know whether he agrees with my view on that. If he is concerned that Parliament might not have more time to debate the significant change suggested now, surely he would consider it inappropriate for Parliament not to have had a role back when the role of judicial review in relation to that tribunal changed so significantly.

I think that there are two debates here. If we are asking our intelligence services to carry out incredibly unique and peculiar work and we have to have a tribunal that is very specialist in reviewing and taking into account work that they do, there is one debate there, but there is a second debate. Even if someone does not agree with that and they think that there should be a right of review, surely it is only right and proper that Parliament should be in a place to debate and decide on that. It should not just happen; the court should not just decide for itself that this is the right thing to do.

As I said, I am keeping my comments brief. I will return on new clause 5, on which I have more points to make.

3 pm

Anne McLaughlin: I will be brief. Basically, I agree with the hon. Member for Hammersmith and share the concerns about this being the second ouster clause in the Bill. I feel it is a bit early to use the legal framework to oust Cart already.

[Anne McLaughlin]

I hope the Government will wait for the Bill to be enacted before trying that. I agree that the new clause is not the way to go about amending this. Such a provision should be a headline measure in a Bill; I think the right hon. Member for South Holland and The Deepings—that is a lovely constituency name—said himself that this would ordinarily be in a new Bill. I understand the argument that there is not an awful lot of time for new legislation, but I think this measure needs to be debated seriously and properly. Parliament needs a full understanding of the issues, following a full consultation.

I would argue an awful lot harder and longer than that, first, if I thought the Government were about to support the new clause, and secondly, if I thought anybody would listen. *[Interruption.]* I do not mean if they would listen to me; I mean if I thought we would ever win a vote in this place. The Government should be very careful in reversing that decision and should think about the consequences of it. I agree with everything that the hon. Member for Hammersmith has said.

Sir John Hayes: I am grateful to the hon. Lady for being so kind to me and my constituency, and my constituents by extension. It is clear that the Attorney General supports the new clause because she drew particular attention to the character of the Privacy International case in her recent speech on these matters. Inasmuch as she is the most senior Law Officer of the Government, whatever the Minister might say today—I appreciate that he may want to hold fire, to some degree—it is clear that the Attorney General understands and supports my argument.

Anne McLaughlin: I am not sure whether the right hon. Gentleman's intervention was aimed at me or the Minister. If he was aiming it at me, all I will say is that it would not be the first, second, third, fourth or fifth way in which I disagreed with the Attorney General in her reckoning. I will sit down and allow others to speak.

James Cartlidge: This has been a good debate on the new clause, which is interesting in many ways from a constitutional point of view, both theoretically and practically. My hon. Friend the Member for Ipswich does not have a secondary role. I am his constituency neighbour. He has a fantastic role that he is fulfilling as a brilliant constituency MP. It was a great honour to campaign with him in the general election, and I see a return on that investment, as he is a vocal spokesman for people of all political shades in the fine county town of Suffolk.

The hon. Member for Glasgow North East may have, shall we say, come here through the use of a crutch, but she should not downplay the role that her speeches could play. Of course we listen. We listen to all sides. Indeed, I have listened intently to the debate on the new clause. I will say one thing to the hon. Member for Hammersmith: although I completely understand where he was coming from, and his points made political sense, he appeared at one point to suggest that it almost was not necessarily relevant to debate the new clause. The new clause is about judicial review, and we know the first two words of the Bill's title. In fact, we just agreed to the clause on the short title, which includes the phrase "judicial review"; I think my speech on that was the shortest I have ever made, by the way.

My right hon. Friend the Member for South Holland and The Deepings made some important contributions, which I am grateful for. I hope he received the letter we sent him, which I believe has been circulated to other Committee members, containing the response on the important matter of the most vulnerable children—those in care. I hope that reassures him on the safeguards. Secondly, on the make-up of the coronial stakeholder group in administrative justice, which introduces a broad umbrella because of the nature of the engagement, I hope that the letter has persuaded my right hon. Friend. I am therefore tempted to eke out the general thread of my argument and hope to encourage him that I am someone who is generally able to persuade people of things. The sword of Damocles that he holds over this speech with the threat to vote can be dealt with.

I should pay tribute to my right hon. Friend for his former role as Security Minister, which he referred to. He was involved in important proceedings when our country, as was proudly illustrated this morning, faced great threats, not least terrorist threats. He was also a Transport Minister, and I met him to discuss roads in my constituency. The essence of his argument was that the Bill does not go far enough, so he wants to debate important probing amendments. I will come back to that wider point.

On the specifics, as has been explained, new clause 3 would amend section 67 of the Regulation of Investigatory Powers Act 2000 by replacing the wording in subsection (8) and adding three additional subsections. Subsection (8) was originally drafted as an ouster clause—we have already debated ouster clauses in relation to clause 2—to ensure that certain decisions of the Investigatory Powers Tribunal would not be subject to judicial review by the High Court. A right of appeal on a point of law was later introduced by the Investigatory Powers Act 2016 and is set out in what is now section 67A.

The tribunal was intended to be the highest authority concerning matters such as the conduct of intelligence services. However, a 2019 judgment of the UK Supreme Court rendered the ouster clause of limited effect in what we have all referred to today as the Privacy International case. The Supreme Court found that while subsection (8) was effective at excluding judicial review of IPT decisions on their merits or jurisdictional decisions involving issues of fact, it did not have the effect of wholly ousting the High Court's supervisory jurisdiction.

The new clause would amend the ouster clause in section 67 by clarifying and adding to the text in that section so as to meet the objection of the Supreme Court in Privacy International. That is an interesting idea, and I am sure my right hon. Friend is aware that the Government's consultation, published in March, expressed concern around the uncertainty that exists as to whether, or in what circumstances, ouster clauses will be upheld by the courts. We therefore consulted on options to try to add some clarity with a broad framework for the interpretation of ouster clauses, but, having reflected on the many useful responses we received, we concluded that although our intention was to add clarity, the effect may in fact be to muddy the waters yet further.

As an alternative approach, we are pursuing the ouster clause in clause 2, which is designed to overturn Cart, seeks to learn the lessons from unsuccessful ouster clauses of the past, and is drafted in a clear and explicit way. We have been open in saying that if that approach

is successful, we may consider whether it can be used as a model for ousters in other areas, where it is appropriate to do so. At least conceptually, I see the link between ousting the High Court from reviewing permission to appeal decisions of the upper tribunal and ousting the High Court from reviewing decisions of the Investigatory Powers Tribunal. They are both essentially concerned with which court ultimately should have the final say on an issue.

Sir John Hayes: I am going to give the Committee the benefit of my further wisdom in a few moments, but on that particular issue, the point about the Investigatory Powers Tribunal is that it is a specialist court, and the intention of the House in establishing that court—the Minister made reference to the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016; the 2016 Act was the one that I took through the House, as he knows—was to indicate that had Parliament decided that the tribunal's important work, which essentially gives authority as well as supervision to the security services, should not be questioned in an ordinary court. The Supreme Court countered Parliament's will in that respect. That is why this is so significant. It draws into question whether the Supreme Court might do the same in respect of other primary legislation that has ouster clauses in it, which is why it is important to act now in this Bill.

James Cartlidge: I pay tribute to my right hon. Friend's legislative prowess in taking that Bill through the House at the time. It is precisely because of his point that in paragraph 55 of our consultation response document, published in July, the example we give of a case where we may look at using a Cart-like model of ouster clause in future is exactly this one—the Investigatory Powers Tribunal. We have made clear that we are looking at that. The Government are not closed-minded to the possibility of going further on judicial review. In a recent interview with *The Sunday Telegraph*, the Deputy Prime Minister spoke of the importance of restoring power to Parliament, while recognising the need for reform of judicial review to be an iterative process. I am sure he will have heard today's debate and the many forceful points made, but the Government will keep an open mind on whether that tribunal might be a candidate for an ouster clause in future.

Our focus in the Bill is to tackle the two particular issues identified by the independent review of administrative law: the efficiency of Cart JRs and the lack of remedial flexibility in judicial review. I know my right hon. Friend the Member for South Holland and The Deepings is sympathetic on this point. There is a good reason for prioritising Cart—we have a judicial backlog, and the resource implication of it is immediate and credible. *[Interruption.]* My right hon. Friend says from a sedentary position that he understands. It will be important to ensure that before an ouster clause is proposed in any particular context, careful thought is given to what will be achieved by doing so and to considerations germane to that context. One size does not necessarily fit all, but we are open minded.

A key point I wanted to communicate is that my right hon. Friend invited me to become a star. His invitation to stellarhood is one I cannot begin to match, but I will at least attempt to do so by offering him an invitation to attend the Ministry of Justice to discuss with officials present some of these ideas in depth—especially given his expertise from his time as a Minister, talking in that neat language of Ministers and officials who know their Bill—and to talk through some of the technicalities. We do see the merit in what he says; it is more a question of timing.

In summary, my right hon. Friend says we do not go far enough; I would say that we go this far at this time. I hope that reassures my right hon. Friend and other colleagues that this is an issue to which the Government are already alive and to which I am sure future consideration will be given. But for now, for the specific purpose of the Bill, I respectfully request that he withdraw his new clause.

Sir John Hayes: When I said the Minister could become a star, I should have said a brighter star, because he has already shone in his response, particularly his generous invitation to meet with and discuss these matters with his officials in his Department. I take his point, of course, about the characteristics of the Bill, the need to address Cart in particular, and its relationship to the backlog in the courts. However, the Bill is about principle as well as practice. There is a practical reason for introducing the Bill, but a principle underpins it, which he has articulated a number of times during our deliberations: it is not right that the court system should be gamed to frustrate the will of the House.

My hon. Friend the Member for Don Valley spoke about his constituents wanting to see the will of the House as a manifestation of their will being delivered. The disturbing rise in judicial activism and judge-made law raises fundamental questions of parliamentary sovereignty. Mr Rosindell, whether you are or are not convinced of that I do not know, as you are the impartial Chair in our affairs, but the witnesses who gave evidence to the Committee are certainly convinced. Professor Ekins said that the Privacy International case did constitute a "very serious attack" on some fundamental questions of the constitution. He stated:

> "The rule of law requires respect for the law, which includes parliamentary sovereignty and the stability of statute".

In oral evidence, Sir Stephen Laws said:

> "If the courts are deciding judicial review decisions that set the rules for future hypothetical cases, they are usurping the legislative function."—[*Official Report, Judicial Review and Courts Public Bill Committee,* 2 November 2021; c. 9-15.]

That is pretty damning criticism of the Privacy International judgment and other recent cases.

3.15 pm

There is an argument that at that time there was a particular group of Supreme Court judges—I am hesitating so as to choose the right words—who took eccentric decisions, and that things have now returned to normal, but that is not good enough. As the Attorney General said in her recent speech,

> "the mould has been broken."

Precedent was set, and that is the problem with ouster clauses. As the hon. Member for Hammersmith will know, other Acts of Parliament, including the Intelligence

Services Act 1994, Security Service Act 1989 and the Police Act 1997, contain ouster clauses that could be challenged on the basis of the Privacy International case.

Tom Hunt: Does my right hon. Friend agree that the key issue in relation to new clause 3 is the Investigatory Powers Tribunal, the complexity of the things it will deal with, and the complexity of the roles of the organisation and people it is overseeing? That complex debate should be dealt with only by Parliament. We are best placed to have that debate and to come to the right conclusion. Decisions about whether judicial review will apply to that or not should be for this place, not for the judiciary.

Sir John Hayes: I agree. Indeed, when I proposed the Investigatory Powers Act 2016, to which the hon. Member for Hammersmith referred and which built on the Regulation of Investigatory Powers Act 2000, which Privacy International specifically dealt with, there was a genuine spirit of co-operation across the House. I worked closely with my then shadow, who went on to become Leader of the Opposition. I often say to him these days, "You learned your trade under me." In fact, I think he said that to me. In any case, we worked closely on those matters and it was detailed scrutiny, as my hon. Friend has just described, that led to that Bill becoming an Act.

Indeed, we undertook extensive pre-legislative scrutiny, and one of the people I appointed to that task is now Attorney General. The scrutiny, under Lord Murphy, looked at the Bill in some detail, as the hon. Member for Hammersmith suggested, and there were long debates in the House and in the other place before it became law. As I emphasised earlier, we were determined that there should be proper safeguards.

The essence of this, Mr Rosindell, is that in these difficult, delicate and challenging matters of security, Parliament has to legislate—I would not say regularly, but as often as necessary—to allow our security services and the forces of law to stay ahead of those who wish to do us harm. The problem is that the capabilities of malevolent elements are dynamic, so the legal powers of those with the mission to keep us safe must match that dynamism. That is always challenging to Parliament, because there is a balance to be struck between the maintenance of law and the protection of liberty. That debate is the context for many of these considerations. It is not the place of the courts of make up the law as they go along, but that is exactly what has occurred.

I referred to the Attorney General earlier. She could not have put that case more plainly in the speech she made a few weeks ago at Cambridge University:

"The Supreme Court's judgment in the case of Privacy International was also profoundly troubling for a number of reasons. A decision by Parliament to limit the judicial review jurisdiction of the Courts should only be taken after the most serious consideration by the legislature. And there may well be circumstances where Parliament does consider that to be appropriate. In such circumstances, the Court should be very slow to deprive legislation of its proper meaning".

That is essentially what the Court did in the case of Privacy International. It deprived legislation of its proper meaning. The most generous way to describe it is that the Court interpreted the decision made by Parliament in what I regard as a perverse way, and, in the words of the Attorney General, a "profoundly troubling" way.

The new clause, which the Minister will know is in scope—it is not for me to gauge that; our expert Clerks judged it, so there is no doubt about whether it is appropriate to add it to the Bill—would address that concern about creeping judge-made law in what is, as my hon. Friend the Member for Ipswich said, a very sensitive area. I am grateful to the Minister, who made a generous offer and rightly drew attention to his helpful letter on issues raised by me and other hon. Members in our earlier consideration. I am particularly grateful to him for fully taking into account the case that I made on behalf of disadvantaged court users; his letter is most welcome in that respect. With the offer that he made of further discussion, the open-mindedness that he has shown and his clear understanding of why the new clause was tabled, I will—hesitatingly and to some degree reluctantly—beg to ask leave to withdraw the motion.

Clause, by leave, withdrawn.

New Clause 5

Evidence in judicial review proceedings

"(1) Unless there are compelling reasons to the contrary, no court shall—

(a) permit oral evidence to be elicited in judicial review proceedings; or

(b) order public bodies or any person exercising or entitled to exercise public authority to disclose evidence in anticipation of or in the course of judicial review proceedings,

(2) In relation to any judicial review proceedings, or in anticipation of any judicial review proceedings, in which a public body or a person exercising or entitled to exercise public authority argues, or indicates its intention to argue, that—

(a) the proceedings concern a matter that is non-justiciable, or

(b) that an enactment excludes or limits judicial review,

(3) In subsection (2), "evidential duty" means any principle of law or rule of court touching the identification of relevant facts or reasoning underlying the measure or other matter in respect of which judicial review is sought, or any order of the court to adduce oral or other evidence.

(4) Nothing in subsection (2) or (3) affects an evidential duty that may arise in relation to judicial review proceedings other than in relation to a measure or other matter that is argued to be non-justiciable or to be excluded from judicial review by legislation."—*(Sir John Hayes.)*

Brought up, and read the First time.

Sir John Hayes: I beg to move, That the clause be read a Second time.

This new clause deals with evidence. Again, it has been deemed by the Clerks to be in scope and it would therefore be an appropriate addition to the Bill. It is very much in the spirit of my previous remarks.

It is important to understand that the new clause has two parts. Subsection (1) aims to limit the extent to which judicial review proceedings involve the testing of evidence and a resolution disputing questions of fact. The traditional view is that judicial review proceedings are an inappropriate forum in which to solicit or test evidence because it is a supervisory jurisdiction that should focus on questions of law rather than questions of fact. That was its well-understood basis for a considerable period of time.

As well as the changing character of the courts' role in relation to the legislature, there has also been a change in the application of judicial review in respect of evidence. The courts ought to be focusing on the legality of decisions taken and whether it stands up to appropriate levels of scrutiny. That is the business of a judicial review. Allowing disclosure and cross-examination could lead to litigation becoming an exercise whereby new material is introduced on a fishing expedition. Rather than testing the proper exercise of powers, as judicial review is supposed to do, it could lead to the whole character of a case being revisited and perhaps the introduction of new evidence that was not pertinent to the original decision or even known to the original decision makers. That is not its role, and the Bill is a perfect opportunity to address that distortion of its original character and purpose.

As the Minister has told us a number of times, the Bill aims to tighten the judicial review process and essentially re-establish its pertinence, salience and purpose. The new clause would do exactly that. The change in practice has arisen partly because of overarching legislation such as the Human Rights Act 1998. There is a case for the wholehearted reform of the Human Rights Act, or its abolition altogether. However, this is not the place to have that debate—although, I understand that the Lord Chancellor has spoken on those matters and is considering addressing them in the House in due course. The point to be made here and now is that the Act has spilled over into judicial review decisions. It is clear that in recent years judicial review using the Act has become an opportunity to have a much wider debate and discussion than this legal mechanism originally intended—the original purpose was to check the correctness of decision making.

Subsection (2) of new clause 5 addresses the problem that arises when judicial proceedings are used to force public bodies to disclose information even in contexts where the public body argues that the law forbids judicial review. If a matter is non-justiciable, or if legislation ousts judicial review, the public body will not be compelled to disclose evidence simply because litigation is threatened or initiated. The clause will require courts to decide whether the matter is justiciable or whether legislation permits judicial review before the public body will have any duty to disclose information relevant to litigation.

New clause 5 would not allow any litigation that should not. Those are cases in which the matter is justiciable and no ouster clause forbids judicial review. It would require courts to make decisions in the right order, avoiding the risk that was apparent in the Supreme Court's Prorogation judgment: that the courts are led astray by the evidence before them rather than focusing squarely on the question of law that they should decide. The Miller judgment was exceptional and, in my judgment, perverse. It is fundamental to our constitution that the appointment of Ministers, the Dissolution of Parliament and, by extension, Prorogation are matters for the Executive and not the courts.

One might argue that when the Supreme Court was established—it was a sorry day, Mr Rosindell, but you will not allow me to debate that at great length here, and nor will I—this was almost bound to happen: that the very existence of the Supreme Court would encourage those who sit on it to extend their powers into matters of what the Attorney General called "high politics". That apart, the Prorogation judgment was a naked example of the courts making a constitutional decision in a way that is appropriate only for this elected House, our Parliament—both because we are answerable to the people and because, as I said earlier, our legitimacy derives from the people. This is about proper process, but it touches on the broader issue of the respective roles of the judiciary, the Executive and the legislature—the separation of powers to which I referred in an earlier sitting.

The Minister will again, I hope, recognise that the new clause is very much in the spirit that he set out when he made it clear that the Government want judicial review to be what it was always intended to be and has been for most of its life, rather than something very different, which is what it has become. With that in mind, I hope that he will give the new clause, which is significant but not in any way out of keeping with the Bill's intent, a fair wind. Rather than, as last time, offering me a meeting—although I was very grateful for that meeting—I hope that this time he will say that the Government accept it, and will at a later stage introduce a Government amendment.

3.30 pm

I do not necessarily expect the Minister to accept the new clause as drafted; he will want his draftsmen to take a close look at it, and often parliamentary draftsmen are able to a better job than I ever could, even with the assistance of my cerebral hon. Friend the Member for Ipswich. The Minister may want to look at the detail of this, but I hope that he will at the very least give it wholehearted consideration, perhaps with a view to the Government coming back with their own thoughts on how we might look at the issue of evidence, and how it is properly used in judicial review.

Andy Slaughter: I give full credit to the right hon. Gentleman, who has taken the new clause, important and substantial though it is, and turned it almost into a Queen's Speech. We will have a second judicial review Bill, a repeal of the Human Rights Act 1998, and then a repeal of the Constitutional Reform Act 2005. The Minister will be a very busy man in the new year.

Sir John Hayes: It is only a matter of time, Andy.

Andy Slaughter: We will see. Unfashionably, I will confine my comments to new clause 5, which restricts disclosure by public bodies and the use of oral evidence in judicial review proceedings to circumstances where there are "compelling reasons". In addition, under subsection (2), if a public body argues, or indicates its intention to argue, in relation to or in anticipation of any judicial review proceedings, that the proceedings concern a matter that is non-justiciable or that review is excluded by an enactment, the public body will not be subject to any evidential duty at all until a court regards the matter to be reviewable.

Subsection (1) relates to disclosure orders, which are already limited by the courts. Additional legislative provision is unnecessary and may reduce clarity and cause unnecessary litigation. Oral evidence is rarely used in judicial review proceedings. However, the courts retain a discretion to permit oral evidence where it is considered necessary to do so. Judges use that discretion appropriately and frequently deny requests to adduce

[Andy Slaughter]

oral evidence unless it would, in fact, be necessary for the case at hand. Applications for oral evidence can be made by claimants and defendants in judicial review claims, and there is no indication that the impact on public authorities has been thought through. The system works well, generally respecting the unique nature of judicial review while allowing parties—both claimants and public bodies—to adduce oral evidence in rare cases where it is necessary to do so. There is no indication that there is a problem with the system that the proposals seek to address.

The new clause goes beyond oral evidence and imposes a bar on judges ordering disclosure of evidence. There is no formal disclosure duty on parties in judicial review proceedings, unless the court orders otherwise. Such orders are already rare and there are many examples of courts refusing applications for disclosure on the basis that they are not necessary. Indeed, the court will not countenance fishing expeditions, where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of finding something to use to fashion a possible challenge. Where the disclosure power is used by courts, however rarely, it is vital: a judge will only ever order disclosure where it is necessary for the fair resolution of the case.

It is unclear what adding a requirement of "compelling reasons" for ordering disclosures of evidence would do to the existing position. The current test, as set out by Lord Bingham in Tweed *v.* Parades Commission for Northern Ireland, is:

"whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly."

On one reading, that would be just an alternative translation of the existing position: a "compelling reason" for adducing oral evidence would be that it is "necessary" to do so. If that is the case, the proposed additional clause is a clear waste of time. However, if it is intended to be a stricter test to raise the threshold for which evidence is admissible, that is problematic in that it would operate to preclude disclosure of evidence required to resolve the case fairly and justly. That would clearly be to the detriment of the parties and the wider public, and therefore should be resisted.

It is also important to note that disclosure of evidence benefits not only the claimant but often the public body, by allowing the defendant public body to show that the decision taken was lawful. Defendant public bodies may also make applications for disclosure and/or oral evidence. Subsection (1) would reduce the ability for claimants to obtain disclosure, which is crucial for claimants to be able to bring a case as well as for defendants to be able to defend it.

Sir John Hayes: I understand that the hon. Gentleman is setting out what the new clause does, but he will understand that at its heart is the determination that judicial review should look at the specifics of an individual case, rather than a systemic consideration of the whole administrative system. In recent times, because of the courts' willingness to draw on all kinds of evidence, they have tended to broaden the scope of their work in a systemic fashion. What does he think about that and what should we do about it?

Andy Slaughter: With respect to the right hon. Gentleman, I do not agree that that is what is happening. Even if he had a point there, I am trying to make the point, by looking at the changes that his new clause would make, that there are already safeguards in the system to prevent that and that the rules are tightly drawn in relation to evidence and disclosure. The courts do have discretion, but they use that appropriately and reservedly.

Any limitation of the disclosure of evidence, as well as oral evidence, beyond the current test risks undermining the effectiveness of judicial review proceedings for all parties. The current form of judicial review, which has limited disclosure requirements on the parties, works only because the parties are subject to duties of candour. In many respects, the disclosure obligations, where parties must submit all relevant evidence and information relating to the case to the court, ensure that the duty of candour is complied with. In the vast majority of cases, both parties comply fully with the duty of candour, but on the rare occasions when they do not, the judge's disclosure powers can be used to ensure proper compliance.

In cases where the duty of candour would be limited by the proposals in subsection (2), which I will come to, the basis for limited disclosure requirements falls away. The combination of subsections (1) and (2) may mean that a claimant in a case is faced with the inability to obtain any disclosure at any point from a public body.

In effect, weakening those disclosure powers weakens the duty of candour, which is a vital aspect of fairness in judicial review. If public bodies feel that they do not need to comply with the duty, it will severely weaken the position of claimants, contribute to an inequality of arms in judicial review proceedings and risk completely barring, in practice, the ability for the claimant to bring a judicial review. For all sorts of reasons, including funding, the tight restrictions on bringing claims and the difficulties of bringing claims, there are already substantial problems for any claimant in beginning judicial review proceedings.

Subsection (2) would enable a public authority to effectively disapply the evidential duties, including the duty of candour, by indicating its intention to argue that the matter is not justiciable. That would make many cases completely un-triable. As I have said, the current form of judicial review, with limited fact-finding and disclosure requirements, works only because the parties are subject to a duty of candour. The duty requires a "cards on the table" approach and, as has been noted,

"the vast majority of the cards will start in the authority's hands".

For claimants to have the ability to get over the starting line and bring judicial review proceedings, the defendant body must be subject to the duty of candour. The duty ensures that all relevant information and material facts are before the court, and that any information or material facts that either support or undermine their case are disclosed.

As the "Administrative Court Judicial Review Guide" recognises, compliance with the duty of candour is "very important". It helps to resolve matters efficiently and effectively. By requiring both parties to undertake full disclosure of relevant information early on in proceedings, it allows for a proper assessment of the merits of the case. That can help public bodies show

claimants early on evidence that the decision was taken lawfully, which can lead to an early settlement, withdrawal of the challenge or at least the narrowing of the issues in dispute. That avoids substantial unnecessary costs and use of court time.

New clause 5 should have no place in the Bill. Subsection (2) would enable public authorities to disapply the duty of candour where they indicate their intention to argue that the matter is not justiciable. When this is combined with increased difficulty with accessing evidence through disclosure orders, set out by subsection (1), claimants will be denied access to evidence required to advance their case, making many cases unworkable. I therefore hope that the Minister will also resist the new clause.

Tom Hunt: It is a pleasure to grace this Committee again through a contribution, and to support my right hon. Friend the Member for South Holland and The Deepings on new clause 5. It is obviously not related to new clause 3. We did attempt to table other new clauses, but we were unsuccessful because they were deemed to be out of scope, but many of those new clauses were, in fact, not dissimilar to or disconnected from new clauses 3 and 5.

In terms of whether different Lord Chancellors are mild korma or vindaloo, I am usually a korma man, but when it comes to review, I am perhaps more vindaloo, because I think that we do need some significant changes in this area.

I very much welcome the Bill, which, with or without these new clauses, is a significant step in the right direction. I have been pleased to sit through all our sittings in support of the Bill, and I think that the Minister has led proceedings very effectively. It has been quite interesting, because although I do not profess to be a lawyer—I am not a trained lawyer or professional—I am an elected Member of Parliament who cares about my constituents and my constituency, but also about this country and the relationship between the Executive, the legislature and the courts, which is vitally important. I make no apology for commenting on these matters and getting involved, because I think it is very important that elected Members of Parliament do so.

We are very lucky to have our judiciary, and the rule of law in this country is respected all over, but some of these figures can be remarkably prickly—and I have noticed that many seem invariably to have the EU flag on their Twitter profiles. I think there is almost a view that elected Members of Parliament are knuckle-draggers who are not entitled to have a view on a lot of these issues. Well, I disagree. I think that when it comes to matters such as sentencing and the operation of the courts, we as elected Members of Parliament, regardless of our specific views, should absolutely be confident to air them and should not be intellectually intimidated by certain individuals.

I sympathise with the broader view about judges assessing law and procedure, rather than getting sucked into contested facts, and about how evidence sessions can sometimes draw them away from their core function and into dangerous waters. There are many cases. The Adams case is connected to new clause 6 so we will not discuss that, but there is an obvious connection between it, the Miller case and the Privacy International case, which we discussed earlier, and that is the creeping role of the courts beyond their brief and scope, and I think that that has damaging consequences. In the Adams case, in terms of the debate on whether it is enough for a Minister or a Secretary of State to make a decision, I really struggle to agree that it is for judges to decide what is appropriate against established Acts of Parliament. That does not make any sense to me. I think that clarity in this area—and Parliament, through legislation, clarifying the relationship between the Executive, the legislature and the courts—is vitally important.

3.45 pm

I go back to this point. I do not see anything that I or my right hon. Friend the Member for South Holland and The Deepings have said as being anti the judiciary or the rule of law. We appreciate that they are vitally important and how skilled and learned those individuals are. But I think we were all quite disturbed by some of the Brexit debates. We had the Miller cases in relation to triggering article 50 and Prorogation, and that *Daily Mail* front page with members of the Supreme Court under the headline, "Enemies of the People". I think that many of us were disturbed by that, and that is what we want to avoid going forward. We do not want that to be the case again. The danger is that unless there is great clarity about what is and is not appropriate for the courts to get involved in, that could happen again, and we do not want that. This is not about us pointing at the judiciary and the courts and blaming them for any of this. We need to be conscious that we need a clear framework that gets that balance right.

I will leave my comments there. It has been a great pleasure to be part of this Bill Committee, which is now coming to a close, and to support this Bill and my right hon. Friend the Member for South Holland and The Deepings.

Anne McLaughlin: Encouraged by the Minister, I have decided that I will say a few words, even if none of them are original. Most of what I have to say is in agreement with the hon. Member for Hammersmith, but it is good to put the opposition of the SNP on the record.

What would this new clause do? Unless there are compelling reasons to the contrary, this new clause would prohibit the use of oral evidence in judicial review and would also prevent courts from ordering any public body to disclose evidence in anticipation or during the course of judicial review proceedings. As we have heard, oral evidence is already rarely used in judicial review proceedings, but the courts retain a discretion to permit oral evidence where it is considered essential to the case. My understanding is that judges use that discretion appropriately, and frequently deny requests to cite oral evidence unless, as I have said, it is considered essential to the case. I am not aware of any indication that the system has the problem that the proposals seek to address.

I wonder what adding a requirement for compelling reasons would do to the existing position. It could be that that is just an alternative translation of the existing position. One compelling reason for adducing oral evidence would be that it is necessary to do so. If that is the case, the new clause is not needed. If the proposed compelling reasons requirement is seen to raise the threshold for

[Anne McLaughlin]

which oral evidence is admissible, I think we should all find that problematic. Judges are already only allowing such evidence when it is considered necessary to do so. The clear result of the proposed change would be that oral evidence that is necessary for the fair resolution of the case would not be admitted. That surely cannot be acceptable to the Minister.

New clause 5 would also bar judges from ordering disclosure of evidence. Again, such disclosure is used only when absolutely essential. Judges order disclosure only when that disclosure is vital to resolve the case fairly. In many respects, the disclosure obligations act as a way of ensuring that the duty of candour is complied with where parties must submit to the court all relevant evidence and information relating to the case. In the vast majority of cases, both parties will comply, but where they do not the judge can ensure compliance by using disclosure powers. Weakening those disclosure powers would, in effect, weaken the duty of candour, which is a vital aspect of fairness in judicial review. If public bodies and Governments believe that they do not need to comply with that duty, the position of claimants would be severely weakened in judicial review proceedings. We should increase access to justice, not make it increasingly pointless.

James Cartlidge: It is a pleasure to follow the hon. Lady, who made some perfectly reasonable points. It is disappointing that she did not rise to the bait by entering into the curry-labelling discussion instigated by the hon. Member for Hammersmith. I am not sure that my hon. Friend the Member for Ipswich is a vindaloo—I think he is a phaal. Anyone who googles that will find that it is the hottest curry there is. Maybe my right hon. Friend the Member for South Holland and The Deepings is a phaal as well. It is inevitable, then, that they all think the Bill does not go phaal enough. As a great fan of curry, I generally go for the specials on the à la Cart menu. *[Laughter.]* That was not a reference to clause 2, by the way.

In new clause 5, my right hon. Friend is probing in his uniquely penetrating way of gaining the Committee's attention and focusing on some important points. I will try to set out why, although there is merit in what he says, it is not right for this precise moment—perhaps with further work, not least as there may be other potential routes to achieving his end.

The new clause would amend the Bill to include some specific rules relating to disclosure and the duty of candour in judicial review cases. The clause would do three things. First, it would remove the ability of the court to permit oral evidence to be given unless there are compelling reasons to the contrary. Secondly, it would remove the ability of the court to order a public authority to disclose evidence at all, either in anticipation of proceedings or during proceedings, unless there are compelling reasons to the contrary. Thirdly, in cases where a public authority is arguing that the subject matter is non-justiciable altogether or judicial review jurisdiction has been ousted, it would remove any evidential requirement on the public authority until the court has ruled on the subject of justiciability or jurisdiction.

The duty of candour is a common law concept that obliges parties in judicial review proceedings to disclose information relevant to the case. The independent review of administrative law examined that duty when it conducted a call for evidence last year. Legal practitioners and other stakeholders identified issues relating to a lack of clarity surrounding the exact extent and precise nature of the obligations arising from the duty. The independent review concluded that the duty of candour may have previously been interpreted in a way that causes a disproportionate burden on public authorities, and that there would be benefit in clarifying the parameters of the duty. The Government would like to ensure that the duty of candour is not invoked by claimants to rouse political debates or to discover extraneous information that would have otherwise been kept confidential.

I reassure my right hon. Friend and my hon. Friend the Member for Ipswich that this remains very much a live issue for the Government. The difference here, I suspect, is not a question of objective, but of how best to achieve it. The independent review recommended that the issue could be addressed through changes to the Treasury Solicitor's guidance. Although that is, of course, a matter for the Treasury Solicitor, the advantage to using guidance to address some of the issues that have occurred with the duty of candour in the past is that it can be more flexible and dynamic than legislation.

As I have already indicated, the Government remain open-minded about the possibility of going further on judicial review reform in time. Although my instinct continues to be that any issues with the operation of the duty of candour are better addressed through other means, and not through primary legislation, I will reflect on the arguments that my right hon. Friend has made for a legislative response. We have already discussed the point of the meeting. I am quite clear that that could be wide-ranging and could include this discussion, too. They all fit within the same theme, which he has painted with a broad brush today. I am quite happy to look at it in those terms, but also in more specific terms, particularly with the benefit of officials and so on.

In the light of the complexity of the issues at stake, and the importance of getting the legislation right, I cannot accept my right hon. Friend's new clause. I hope that, with my reassurance that that the Government will continue to actively consider the matter, he will agree to withdraw it.

Sir John Hayes: I am grateful to the Minister for again offering further discussion on these subjects. I am also pleased that he is considering other means to achieve the objectives that I set out. He is right that the independent review addressed these matters and, by the way, did so on the basis that I described: that by taking wide evidence judicial review was rehearsing decisions rather than checking on the exercise of them. Judicial review is about ensuring that, in the exercise of decision making, all has been done properly. It is not about reheating wide-ranging contextual arguments.

The problem with collecting oral evidence in a permissive way is that it is bound to lead to just that. That was identified by Professor Ekins and others, in the evidence that they gave us and beyond. The Minister is right to consider through guidance how that could be altered. Statutory guidance would be a very effective way of doing it, providing that his officials and others are confident that it is sufficient. There is always a balance to be struck between primary legislation and guidance, and we need to be clear that it will be sufficient in this case.

We talked a little about how jurisprudence has moved on, and in particular the Miller case. In the end, the decision of the Supreme Court in that case meant that it, in the words of the Attorney General,

"stepped into matters of high policy in which the UK courts have historically held themselves to have no constitutional role."

That is a direct quote from the Government's most senior Law Officer. In the two new clauses, and in those that were not selected because they were deemed not to be in scope, and which I will therefore not discuss, I have tried to make the case that the Bill is very welcome, but it is a korma rather than a vindaloo. It is certainly not a madras. It can be more varied and hotter, to develop the metaphor. I can match the Minister blow for blow in terms of my grasp of Indian cuisine.

James Cartlidge: On a point of information, my right hon. Friend must be aware that a madras is technically milder than a vindaloo, but a vindaloo is certainly milder than a phaal.

Sir John Hayes: That is true, but I see the Minister as something between the two. He is more of a jalfrezi—spicy, lively and deeply satisfying, in terms of his response to my new clauses at least.

It is worth drawing attention to the remarks of Lord Sumption, who of course commented on exactly these matters in his Reith lecture. Jonathan Sumption is the judge who, perhaps more than any other, has set out the proper functions of the courts in relation to Parliament. In his Reith lecture, he said:

"It is the proper function of the courts to stop Government exceeding or abusing their legal powers."

That is exactly the role of judicial review, by the way. He continued:

"Allowing judges to circumvent parliamentary legislation, or review the merits of policy decisions for which Ministers are answerable to Parliament, raises quite different issues. It confers vast discretionary powers on a body of people who are not constitutionally accountable for what they do. It also undermines the single biggest advantage of the political process, which is to accommodate the divergent interests and opinions of citizens."

He went on to say in that lecture that it was about developing the right kind of political culture. It is appropriate that the political culture that underpins our deliberations in this place is a means by which views can be mitigated and ameliorated, where necessary, in a way that courts cannot do because of their character and function. I remain of Jonathan Sumption's view that much needs to be done to put right what the courts have got wrong in recent years, and I stand alongside the Attorney General in her determination to do that.

4 pm

Although I understand that the Bill is not sufficiently wide-ranging to do all that I want it to do, there is scope for the Government to do more in respect of the new clause and new clause 3. I am grateful that the Minister has implicitly acknowledged that by welcoming further discussion.

On the new clause that stands in my name and that of my hon. Friend the Member for Ipswich—I will just say, as the Minister did, that my hon. Friend is an outstanding Member of Parliament and the people of Ipswich should be proud to have him—I beg to ask leave to withdraw the motion.

Clause, by leave, withdrawn.

New Clause 10

PUBLICLY FUNDED LEGAL REPRESENTATION FOR BEREAVED PEOPLE AT INQUESTS

'(1) Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows.

(2) In subsection (1), after "(4)" insert "or (7)."

(3) After subsection (6), insert—

"(7) This subsection is satisfied where—

(a) The services consist of advocacy at an inquest where the individual is an Interested Person pursuant to section 47(2)(a), (b), or (m) of the Coroners and Justice Act 2009 because of their relationship to the deceased; and

(b) One or more public authorities are Interested Persons in relation to the inquest pursuant to section 47(2) of the Coroners and Justice Act 2009 or are likely to be designated as such.

(8) For the purposes of this section "public authority" has the meaning given by section 6(3) of the Human Rights Act 1998."'—*(Andy Slaughter.)*

This new clause would ensure that bereaved people (such as family members) are entitled to publicly funded legal representation in inquests where public bodies (such as the police or a hospital trust) are legally represented.

Brought up, and read the First time.

Question put, That the clause be read a Second time.

The Committee divided: Ayes 4, Noes 10.

Division No. 19]

AYES

Barker, Paula	Slaughter, Andy
Daby, Janet	Twist, Liz

NOES

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

Question accordingly negatived.

Andy Slaughter: On a point of order, Mr Rosindell. Before we conclude our proceedings on the Bill, I wonder whether it might be appropriate to offer my thanks, on behalf of me and my colleagues, to everyone who has contributed to making this, certainly compared with other Bills that I have done in the past, a smooth-running and not unenjoyable process, if I may put it that way. I will not take up a lot of time, but I would particularly like to thank you, Mr Rosindell, and Sir Mark for the efficient and not indulgent, but certainly sympathetic, way in which you have chaired these proceedings. I know that that has been difficult, particularly today, because we had Sir David Amess's memorial service this morning. We all respect the fact that you and Sir Mark have chaired the Committee with your usual great skill and attentiveness.

I thank the Clerks, who have given us extraordinary assistance on technical matters relating to the Bill, for the way in which they have helped us, and helped me, with my rustiness, to get through the first Bill that I have done in this capacity for a number of years. I also thank everyone else who makes this a smooth-running

[Andy Slaughter]

process. That includes the Doorkeepers, *Hansard* and everyone else on whom we rely to ensure that these things go as smoothly and efficiently as possible.

May I say thank you to a few other people? I thank the Minister and his colleagues for the way in which they have approached the Bill. There are some fundamental differences between us. We voted against the Bill's Second Reading and, sadly, we have not managed to carry many votes here to improve the Bill. There are a number of improvements and amendments within the changes to the courts procedure that we would fully support, but there is, at the heart of the Bill, something that we find worrying, which is a further attempt by the Executive to encroach on the discretion of the judiciary, which is one of the great sacred parts of our constitution, so I am glad that at least we have resisted today any further attempts to do that.

Notwithstanding that, this Committee has undertaken a good-natured, but at the same time thorough, investigation of the provisions. I thank all my colleagues for their assistance and prompting—even when I go on for a long time—but I would particularly like to thank my hon. Friend the Member for Stockton North, who, seeing me just beginning my role and being thrown in at the deep end with the Bill, stepped up, notwithstanding having just been a shadow Minister on the Police, Crime, Sentencing and Courts Bill, to carry the burden of dealing with the substantial bulk of the provisions here. Sadly, he is not with us today because he has tested positive for covid. Therefore, I have been told to go off and get a PCR test as well; we probably all have as a consequence of that. I gather that my hon. Friend is tired but otherwise in good spirits. He is an extremely kind and courteous gentleman at all times, and I am sure that we all wish him a speedy recovery.

We have come almost to time on the Bill. We thought that we might go short; we have taken our time, but we have not taken more time. All I will say in conclusion is that there has been a culinary theme to the Bill. We had cherries on the first day, and ended with curries on the last, but I hope that, in looking at the transcripts, those who scrutinise us will not think we have made too much of a meal of it.

James Cartlidge: Further to that point of order, Mr Rosindell. May I echo the remarks made by the hon. Member for Hammersmith, particularly in thanking you and Sir Mark for your dual chairmanship, which has operated effectively and efficiently, together with your officials and the Clerks? May I particularly thank the Doorkeepers? As I said earlier—I really meant it—what we saw from them today, walking behind Sir David's coffin, was incredibly moving.

I thank all members of the Committee, on both sides. No one goes into proceedings expecting that we will all agree on all points, but that does not matter; conduct is different from that. I think we have seen effective debate, proceeding at reasonable speed most of the time, but with that combination of depth and rigour that is important in a Bill Committee. That is the point: we are going through a Bill line by line. I am grateful to SNP and Labour colleagues. I particularly thank those on my side of the Committee. We heard many excellent speeches and contributions, but they also knew when to keep their own counsel, so that we could keep the ship of the Bill sailing in the right direction.

This is an important Bill. The context is difficult. The post-pandemic situation is challenging, with a significant backlog of cases, and we are doing everything we can to deal with that. The Bill contains some significant measures on that front. It also contains the important reform of judicial review—more for another time.

It remains only for me to thank everybody for their participation. I am grateful that we have managed to move to this stage, and that we now move onwards and upwards.

Sir John Hayes: Further to that point of order, Mr Rosindell. On behalf of the Back-Bench Members on this side of the Committee—and I hope others too—I thank the Minister and the shadow Minister. I served as a shadow Minister and a Minister for 19 years and I know how hard it is, particularly from the other side of the Committee, to maintain the progress of debate and to retain the calibre and character of scrutiny.

I thank the Minister for the way he has gone about his business, and the shadow team for the way they have gone about theirs. I wish the hon. Member for Stockton North well, as he has now fallen ill. I also thank you, Mr Rosindell, and your fellow Chairman, and all others who have made the Bill proceedings possible.

Anne McLaughlin: Further to that point of order, Mr Rosindell. I want to reiterate what everybody else has said and thank everybody involved. I wish the hon. Member for Stockton North well and I hope that he recovers by a week today, St Andrew's day, because he will be wanting to celebrate.

I thank my hon. Friend the Member for Lanark and Hamilton East—I have finally got the constituency name. That is not as great a constituency name as South Holland and The Deepings, however. I am going to visit, and I will let the right hon. Gentleman know when I do.

This has been a really interesting Bill Committee. I used to resist going on Bill Committees, but I came from the Nationality and Borders Bill Committee straight to this one, and they are the best bit of the job, because they are probably the only time we really get an in-depth understanding of what we are doing. A lot of the time, we have to skim through things because there is so much to consider. I look forward to the next Bill Committee.

I thank the Clerks and everyone involved, including the Doorkeepers. For those who are not speaking and are not involved in the debates, it must be really boring having to sit there and listen to it all. There are no nods of agreement there, but I can pick the answer up telepathically. If I have missed anyone in my thanks, I am sorry—oh, the Chairs. Thank you very much; thank you again for your forbearance, Mr Rosindell, when I was injured. I am still injured, but am recovering.

James Cartlidge: Further to that point of order, Mr Rosindell. I did not mention the hon. Member for Stockton North; I hope he recovers. I also wish to thank my officials, who have been excellent—very high quality—for my first Bill Committee. I hope we keep up the good work as we move forward. I am grateful to everyone who has helped us to reach this point.

The Chair: I add my thanks to the Committee for its deliberations over the past few weeks; to my colleague, Sir Mark, for co-chairing the Committee with me; and to Clerks, officials, Doorkeepers and all concerned in ensuring the passage of the Bill through Committee.

Bill, as amended, to be reported.

4.13 pm

Committee rose.

Written evidence reported to the House

JRCB16 Professor Jason Varuhas (supplementary)

JRCB17 Northern Ireland Human Rights Commission