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Richard III: Myths & Facts

The Richard III case¹, in which the Justice Secretary was a Defendant, is often cited in justification of the measures now introduced in Part 4 of the Criminal Justice and Courts Bill. It has been said that the case was abusive, a waste of taxpayer money, made possible only because the court wrongly granted a 'Protective Costs Order' (PCO) limiting the claimant's costs liability in the event that the claim failed.

Richard III was a unique case, quite different in nature from the many others that the proposed reforms will prevent. Whatever one's view of it, a single isolated case does not provide an evidence base for reforms which are - outside Government - universally considered to be incompatible with the Rule of Law. But if it is to be held up as providing such evidence, it is worth considering that case by reference to its facts.

Substance of the Case

- The court considered its task to be “*to ensure that the decision as to the final resting place of the remains of a former Monarch is arrived at in a proper manner*”. The factors that led the court to conclude that this was a matter of general public importance included: that the issue had aroused a great deal of strong public feeling in the country; it had led to a Parliamentary debate; the Government had sought to arrange a consultation meeting with national bodies, including the Church of England, the Catholic Church, and HM The Queen; the discovery of Richard III's remains was “*unprecedented*”, touched on our history, heritage and identity, and engaged interests beyond those of the immediate parties, touching on Sovereign, State and Church².
- Some, particularly those of Republican persuasion, may disagree with the Court's assessment. But it cannot be said that this case was brought as a publicity tool (an allegation which the Court expressly rejected³), still less a publicity tool deployed by the “Left”.⁴
- Richard III was not an abusive claim. It was sufficiently meritorious to be granted permission, and was then heard by a Divisional Court which produced

¹ The Queen (on the application of the Plantagenet Alliance Limited) v The Secretary of State for Justice & the University of Leicester – CO/5313/13.PCO Judgment: [2013] EWHC 3164 (Admin); Substantive judgment [2014] EWHC 1662

² Paras 34-35 PCO judgment

³ Para 49 PCO judgment

⁴ <http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html>

a detailed and authoritative judgment concluding the matter without recourse to onward appeal. The recognised public interests in this unique case were authoritatively determined by a court of law doing its proper job. It is not necessary for a claim to succeed for there to be public interest in a judgment.

Funding

- Legal aid played no part at all in this case.
- The Court actively considered the financial circumstances of the Claimant and its potential backers and concluded that the Claimant did not have the funds to finance litigation. The Defendants did not challenge the Claimant's evidence or appeal against that finding.⁵ A PCO was granted in light of the Court's clear findings both as to the public interest and the financial inequality between the parties. The Court applied the established tests developed to ensure access to justice (and which the proposed reforms in large part mirror). The Government could ultimately have appealed to the Court of Appeal if it considered that decision wrong in law. It did not do so.
- This was not about 'greedy' Claimant lawyers. The Claimant in this case was represented by lawyers acting on a no win, no fee arrangement (a CFA). In the event that the claim had been successful the claimant's lawyers would have received payment well below market/commercial rates as the claimant's costs were capped - in the normal manner where a PCO has been granted.⁶ As it was, the claim failed and the Claimant's lawyers will have received no payment at all.
- By contrast defendant lawyers receive payment from the Government departments or local authorities whether they win or lose. Here the Justice Secretary argued that the case was "a *'fairly standard' judicial review, not factually or commercially complex or document-heavy*" and yet still opted to instruct First Treasury Counsel and two junior counsel. While there is inevitably some cost for defendants to judicial review claims, they should not be overstated, and neither should the fact that defendants do have choices as to the measure of costs they incur be entirely overlooked.

In any event, would this Bill address even the perceived 'mischief'?

- Had the provisions of the CJC Bill been in force at the relevant time, the facts above suggest that the unusual, one-off albeit controversial case that was Richard III would have been unaffected. The PCO in this case was granted concurrently with permission (Clause 68(3)) because the Court decided that

⁵ Paras 42-44 PCO judgment

⁶ In contrast to any other case (including cases covered by Legal Aid) in which the successful claimant is entitled to recover their costs at full commercial rates.

the case raised issues of general public importance which the public interest required to be determined by the Court (Clause 68(6) & (7))⁷. The Court considered the relative financial positions of the parties (Clause 65(2), 69(1)(a)). When granting the PCO, the Court imposed a cross-cap on the Claimant's ability to recover costs from the Government had the Claimant won (Clause 69(2)).

- Therefore, and in short, the proposed reforms would have made no obvious difference to the very case which is said to be key in justifying their introduction. Where they will make a difference is to the meritorious public interest cases they *will* prevent from ever reaching court, to the valuable interventions that the court will be denied, and in undermining the quality of public decision-making.
- These reforms are not really about Richard III. Access to the court will continue to be afforded to monarchs, living and dead, and those that can afford for their interests to be represented. It is the rest of the community, and in particular the poorest members of society, that will be affected.

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2 July 2014

⁷ Clause 68(3) will in practice act to prevent meritorious claims being brought because the costs risk of the permission stage will be too great to bear. But the stated intent of the reforms is to only to dissuade PCO application cases in which permission would not be granted.