



Public
Law
Project

Consultation response Judicial Review: Proposals for Reform

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Glossary

ADR

Alternative Dispute Resolution

CPR

Civil Procedure Rules

CPRC

Civil Procedure Rule Committee

FTT

First-Tier Tribunal

HRA

Human Rights Act

IHRAR

Independent Human Rights Act Review

IRAL

Independent Review of Administrative Law

“IRAL submissions”

Responses to the Call for Evidence issued by the Independent Review of Administrative Law in late 2020. Many are available here: <https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/>

MoJ

Ministry of Justice

SI

Statutory Instrument

UTAAC

Upper Tribunal (Administrative Appeals Chamber)

UTIAC

Upper Tribunal (Immigration and Asylum Chamber)





Introduction

The importance of judicial review

1. Judicial review ensures fair and lawful public administration and promotes high quality public decision-making. It ensures that the executive obeys the laws enacted by Parliament and guarantees that individuals have access to justice and redress following unlawful state conduct. In his foreword to the consultation, the Lord Chancellor makes clear that he agrees with these principles.¹
2. Regretfully, however, this package of proposals does not serve those principles. If anything, they undermine them. The proposals go too far in restricting access to justice and fair outcomes for individuals. The impact of the proposals is not justified by the weight of evidence or the Government's underlying concerns. The result is a set of changes which are disproportionate and unjustified.
3. In our response, we directly address the concerns identified by the consultation and demonstrate how they are already satisfactorily resolved by current arrangements and, where they are not, we show how the Government's proposals can be made more proportionate and sustainable while still accomplishing the underlying objectives.
4. We note that for the second time during a global pandemic – the first occasion being IRAL's own consultation – the Government is consulting on a wide-ranging and highly technical set of questions about judicial review and is allowing only six weeks for respondents to consider and submit responses. Constitutional reform of the nature that is being proposed is a serious undertaking. Yet, the Government has offered no justification for these short time-limits which inevitably will impair the quality of responses, diminish the integrity of the Government's subsequent proposals and reduce Parliament's capacity to scrutinise them.
5. We further express our regret that that the Government does not acknowledge

¹ He states that the aims behind his reform proposals include "restor[ing] the place of justice to the heart of our society", "affirming the role of Parliament" and "holding the executive to account": see Consultation at para. 4.



any interrelationship between the Independent Human Rights Act Review (IHRAR),² the New Plan for Immigration,³ and this consultation. Each exercise might make changes related to judicial review but there is no acknowledgement that these exercises will have cumulative consequences for the rule of law and justice for individuals beyond their individual reforms.⁴ It is a case of the right hand not knowing what the left hand is doing. This fragmented approach is no way to accomplish something as important as constitutional reform.

Prioritising certainty for the executive

6. Throughout the consultation document, the Government repeatedly refers to ‘the rule of law’. We do not question the importance of this ideal. However, the idea of the rule of law upon which the Government relies is unduly narrow. It prioritises executive power over and above its accountability and responsibility to the people and Parliament whom it serves. This interpretation of the rule of law has been described as “highly selective”⁵ and “highly contestable.”⁶ We agree with this criticism. The consultation reduces a complex and multi-faceted concept which is at the core of British democracy into merely a justification for certainty and predictability for the executive.
7. Certainty is *one* aspect of the rule of law, but it is not the only aspect or necessarily the most important one. Another crucial dimension of the rule of law is the need for Government under law. Judicial review is the systemic manifestation of the principle outlined in *Entick v Carrington*⁷ that the executive must find authority for its actions in law and not merely in its own will or political

² <https://www.gov.uk/guidance/independent-human-rights-act-review>.

³ <https://www.gov.uk/Government/consultations/new-plan-for-immigration>.

⁴ For instance, there is no evidence in the consultation or elsewhere that the major changes proposed to immigration judicial review in the New Plan for Immigration were shared with IRAL or with the Ministry of Justice. All indicators are that reform is occurring in a haphazard and inconsistent way.

⁵ Mark Elliott, Public Law Project seminar, *The Government’s judicial review consultation: Remedies and ouster clauses*, 19 April 2021.

⁶ Paul Craig, “IRAL: The Panel Report and the Government’s Response” (*UK Constitutional Law Association Blog*, 22 March 2021).

⁷ [1765] EWHC J98 (KB).



preferences. The principle is at least 900 years old in this country.⁸ As we detail below, the consultation consistently pays insufficient respect to the requirement of Government under law. This is particularly evident in relation to the proposals on remedies, which, if enacted, will make it substantially more difficult for individuals subject to state power to obtain meaningful relief following their unlawful use.

8. The rule of law embodies a perennial tension between certainty and justice.⁹ Any conception of the rule of law which reflects our values and traditions must seek to achieve and balance both. Lord Mance has noted that “[c]ertainty can be pushed too far, and, if it is coupled with Governmental suspicion of judicial discretion, it can lead to potential injustice.”¹⁰ The central problem with the consultation proposals is that they expressly prioritise certainty for the executive above justice and fairness for individuals. The vision of the rule of law presented inadequately protects individuals against the power of the state and unduly prioritises executive power.
9. In consequence, despite claims to the contrary, these proposed changes do not strengthen the rule of law. In combination, they undermine the rule of law in a significant way.
10. By way of example, the proposals place great weight on the importance of procedural compliance by the claimant, whereas in relation to the executive, the aim is often to reduce procedural compliance and enhance flexibility.¹¹ Whilst we agree that rigour is often necessary, the proposals neglect the importance of procedural flexibility, which may be just as vital for serving the rule of law in some circumstances. As Lord Mance has put it, “the infinite circumstances affecting human existence fit uneasily within straitjackets.”¹² Placing too great an emphasis on procedural rigour at the expense of procedural flexibility threatens

⁸ Lord Sumption, “Magna Carta then and now”, Address to the Friends of the British Library, 9 March 2015, available at <https://www.supremecourt.uk/docs/speech-150309.pdf>.

⁹ Lord Mance, “Should the law be certain?”, The Oxford Shrieval Lecture, 11 October 2011, available at https://www.supremecourt.uk/docs/speech_111011.pdf, p.20.

¹⁰ Ibid, p.6.

¹¹ Such as the proposal to extend time limits on public bodies to file a detailed grounds of defence from 35 days to 56 days.

¹² Lord Mance, “Should the law be certain?”, The Oxford Shrieval Lecture, 11 October 2011, available at https://www.supremecourt.uk/docs/speech_111011.pdf, p.6.



the “fairness that is inherent in our justice system.”¹³ This consultation falls into exactly that error.

The evidence basis for reform

11. The evidence basis for the reforms proposed – particularly given their constitutional significance – is wholly inadequate. The Government is pursuing reform, at least in part, due to a desire to correct a state of affairs which does not exist. The proposals appear to be based on an understanding, allegedly vindicated in IRAL’s report, that there is “a growing tendency” in judges to be “more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made.”¹⁴
12. However, this is the opposite of IRAL’s finding. Its report concluded that “Government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of Government action.”¹⁵ Whilst some cases were singled out by IRAL as potential causes for concern, there was no evidence offered of a systemic or general tendency, much less a “growing tendency” of judicial overreach or capitulation of the proper judicial role. The Chair of IRAL, Lord Faulks, has himself criticised this mismatch between IRAL’s findings and the Government’s claims.¹⁶
13. The Government’s consultation amounts to partially accepting IRAL’s report, while simultaneously ignoring its inconvenient aspects and rejecting parts of it without acknowledging that it has done so. This approach calls into question the degree to which the Government is engaging in discussion on reform in an even-handed and transparent way. A number of the proposals are also highly vague, making it difficult to respond in a considered, detailed, and evidence-based way.

¹³ Consultation at para. 5.

¹⁴ Consultation at para. 2.

¹⁵ IRAL Report at p.132.

¹⁶ In an interview with Joshua Rozenberg, Lord Faulks rejected that summary of the Panel’s findings, saying: “There are some cases which we thought... were crossing a line. But it’s one thing to say, well, there are one or two cases the result of which is questionable... to then go on and conclude that there’s an overall drift in one particular direction. And I think there’s a slight danger that you can go from the particular to the general.” (BBC Law in Action, “Reforming Judicial Review”, 25 March 2021).



In fact, in at least two instances, namely questions 13 and 15, the proposals put forward by the Government bear no relationship to the actual question asked.

14. While some of the proposed changes relate to recommendations made by IRAL (those relating to *Cart* reviews and suspended quashing orders), most go beyond the report. While in some instances the proposals relate to areas IRAL identified as candidates for *potential* reform (IRAL did raise the possibility of, for example, abolishing the requirement of “promptitude” when bringing a judicial review claim), in other cases IRAL specifically recommended *against* the reform pursued by the Government. For example, IRAL recommended against legislating in the area of ouster clauses and cautioned against legislating to the effect that different regimes would apply across different jurisdictions. Nevertheless, this is what we find in this consultation. Consequently, the Government is not just *going beyond* IRAL’s recommendations but in some cases is *going against* them.
15. This approach is entirely at the Government’s discretion to take. However, the effect is that current proposals are only partly based on IRAL’s report and there should be no pretention to the contrary. Respondents are therefore being asked to comment on proposals, the evidence for which is not found in IRAL’s report. In some cases, the Government claims that its proposals originated in an unnamed “submission” to IRAL. Particularly given the short timeframe for consultation, this inevitably makes it difficult for respondents to fully and properly engage with the evidence base of the proposals without reading each of the hundreds of submissions to IRAL, some of which the Government has refused to publish.
16. In our submission to IRAL, we expressed concern that the Government was pressing ahead with significant reform which was not based on solid evidence. Despite IRAL helpfully publishing the quantitative data upon which its report relied, the evidence basis for the current reforms remains insufficient, either in that it is inadequate or in some cases nowhere to be found. Our concerns are greatly exacerbated by the fact that Government departments have refused to disclose their own submissions to IRAL in full. The summaries provided can be vague, difficult to interpret in places and, on occasion, appear to put forward data which is flawed or inaccurate.¹⁷ We continue to call on the Government to release all IRAL submissions of Government departments in full.

¹⁷ By way of example, Tom Royston has pointed out that in the summary Government submissions, the DWP claim to have lost just 5 judicial review cases since 2018. However, he was able to point to 8 reported judicial review cases in which the DWP lost on the merits handed down in 2020 alone.



17. Furthermore, we continue to advocate for greater use of evidence in legal and constitutional reform and note that the evidence relied upon here is far from adequate. Indeed, for most of the questions consulted upon, the evidence basis is either inadequate or nonexistent. Moreover, in a regrettable number of instances, notably in relation to the Government's claims regarding IRAL's headline finding, the consultation is actively misleading and tendentious.

The Government's manifesto promises

18. This programme of reform is in pursuit of a manifesto commitment to ensure "a proper balance between the rights of individuals, our vital national security and effective Government."¹⁸ The current proposals do not reflect a fair balance in this respect. The manifesto promised that the Government would "ensure that judicial review is available to protect the rights of the individuals against an overbearing state." If enacted, the current proposals would frustrate this aim. Finally, the pledge foregrounds "access to justice for ordinary people." The current proposals undermine exactly this.

19. The proposals on which the Government is consulting would shift the balance of power decisively in favour of the executive. The result is a package of measures that undermines the ideal of Government under law; undermines the obedience of the executive to the will of Parliament as expressed in statutes; undermines meaningful remedies for individuals who have suffered unlawful Government conduct; and undermines procedural equality of arms between state and individual.

¹⁸ Conservative Party 2019 Manifesto p.48, available at <https://www.conservatives.com/our-plan>.



Question 1

Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

20. PLP does not think there is sufficient merit in suspended quashing orders to justify legislating for their introduction, nor do we think the precedent in section 102 of the Scotland Act 1998 (and equivalent devolution acts)¹⁹ changes matters. PLP is, in any case, opposed to either the mandatory or presumptive approach presented in the consultation (see further discussion in response to Q6). We think the current suite of remedies – including declaratory relief – are fully sufficient, particularly when considered in conjunction with the duty on the court to refuse relief if it appears highly likely that the outcome would not have been substantially different if the unlawful conduct had not occurred (s31(2A) Senior Courts Act 1981).²⁰

21. Further, we query whether *Ahmed v HM Treasury (No 2)*²¹ does, as the IRAL Report suggests,²² in fact rule out the possibility of a suspended quashing order being issued in a common law judicial review case using the court's existing remedial discretion.²³

22. PLP therefore rejects the proposal for the introduction of legislation to allow Courts to make suspended quashing orders. However, if such orders *were* to be put on a statutory footing their use should be left to the discretion of the court. They should not be mandatory nor should they be presumed to apply. In line with the general approach to judicial review remedies, such orders should be entirely discretionary, so judges are able to consider the merits on a case-by-case basis.

¹⁹ Northern Ireland Act 1998 s.81 and Government of Wales Act 2006 s.153.

²⁰ Inserted by Criminal Justice and Courts Act 2015 s84.

²¹ [2010] UKSC 5.

²² See IRAL Report at para. 3.57.

²³ See Sir Clive Lewis, *Judicial Remedies in Public Law* (6th ed, 2020) at 5-013 and Michael Fordham QC, *Judicial Review Handbook* (7th ed, 2021) at 24.4.18.



The formulation proposed by the IRAL at para 3.68 of its report would achieve this.

23. The criteria proposed by the Government do not strike a fair balance between the interests at stake in judicial review proceedings. In particular, they give too much weight to the suggested cost of compensation for unlawful conduct. This overlooks that damages are only available as a remedy in judicial review proceedings if there is a private law right of action. The Government does not explain how it proposes that private law damages claims would be affected by a suspended quashing order.

24. If criteria were to be imposed, there should be a presumption that such orders are *not* issued, except in exceptional circumstances and where suspending the order would be in the overall interests of justice. However, we do not think any such criteria are needed because the Courts are more than capable of granting remedies that do justice in a particular case. As recommended by the IRAL panel, it should be left to the courts to develop the criteria/factors to be taken into consideration in deciding whether to suspend a quashing order.

Purported justification for suspended quashing orders

25. The arguments in favour of suspended quashing orders put forward by the Government include the following: they would reduce the level of disruption to public authorities; they would provide certainty for third parties (especially in relation to statutory instruments);²⁴ they can offer a “stronger” remedy than declaratory relief;²⁵ and there is a precedent for such a measure in the devolution

²⁴ The Ministry of Justice’s report Summary of Government Submissions to the Independent Review of Administrative Law (https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/976219/summary-of-Government-submissions-to-the-IRAL.pdf) states that “Departments were also concerned about questions of legal certainty and that individuals who rely upon statutory instruments (which are subject to Judicial Review) should not be penalised if the statutory instrument is subsequently quashed.”

²⁵ IRAL uses the example (see IRAL Report at para. 3.53) of *Hurley and Moore* in which the Court found breach of the Public Sector Equality Duty (PSED) but declined to quash the offending regulations for fear it would cause “administrative chaos” instead issuing a declaration that left the Secretary of State “free to disregard his statutory duties”.



acts.²⁶

26. We do not think that the risk of public authority disruption is a strong justification for the use of suspended quashing orders, particularly in light of the prejudice that may result from justice being delayed or denied to individuals. Whilst we recognise that quashing legislation can cause disruption to Government and public bodies, we would note that Government machinery has significant resources to respond. There are generally many options open to Ministers on the rare occasions a decision or statutory instrument is quashed. Government is better placed to bear this disruption than individuals are to face ongoing prejudice, even for a short period. In practice, Government Departments will have had time to plan for contingencies and consider how to respond to an adverse court judgment.²⁷

27. Further, the prospect of an unlawful decision being quashed acts as a deterrent to poor decision making.²⁸ Suspended quashing orders may well have the opposite effect. Government lawyers advise Ministers on policy decisions and secondary legislation in accordance with the GLD legal risk guidance (which presents legal risk in percentages and assigns a label of red/amber/green)²⁹. The risk assessment comprises three distinct matters: ‘Likelihood of a legal challenge being brought’; ‘Likelihood of that challenge being successful’ and ‘Impact and consequences of that challenge, whether successful or not’. If secondary legislation is at risk of being found to be unlawful and quashed the impact of a successful legal challenge will be greater, which may in turn prompt decision makers/Ministers to adopt a less risky course of action. The possibility of a suspended or prospective quashing order is likely to reduce the ‘impact of

²⁶ Consultation at para. 54.

²⁷ Including during the period before a final determination e.g. *Unison v Lord Chancellor* took over 5 years from the date the claim was first issued on 28 June 2013 to the Supreme Court judgment on 26 July 2017. The practice of issuing embargoed judgments to Departments a week or so before their public hand down allows departments to prepare for any consequences (see [2017] UKSC 51, [2015] EWCA Civ 935, [2014] EWHC 4198 (Admin) and [2014] EWHC 218 (Admin)).

²⁸ On the positive relationship between judicial review and the quality of decision-making, see Catherine Haddon, Raphael Hogarth and Alex Nice, “Judicial Review and policymaking: the role of legal advice in Government” (Institute for Government, 2021), available at <https://www.instituteforGovernment.org.uk/publications/judicial-review>.

²⁹ Government Legal Department, *Guidance Note on Legal Risk*, https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/736503/Legal_Risk_Guidance_-_Amended_July_2015.pdf.



challenge’ for the Department, and water down this deterrent effect.

28. What is fundamental but missing from the Government’s consultation paper is the imperative that justice is done for those affected by unlawful actions. A successful claimant in a judicial review case has already had to endure the effect of an unlawful decision during the period prior to the court’s determination (and challenge). To deny access to a remedy for a longer period still may be wholly unjust.
29. That being said, we agree with IRAL that quashing orders, even if suspended, may in some cases offer a stronger remedy than a declaration. For example, we accept that a suspended quashing order would have been a more appropriate remedy in the *Hurley and Moore* case, to which the IRAL Report refers. A suspended quashing order may also have utility in a case involving international law obligations such as *Ahmed (No 2)*.³⁰ But such examples are exceptions; in many cases, a quashing order or declaratory relief will be the more appropriate remedy, which is why it is important to leave the decision as to whether to issue a suspended quashing order to the judges in each case. Suspended orders should certainly not be the default remedy.
30. We are also aware of cases where Government guidance or secondary legislation has been declared unlawful, and yet the Department has been very slow to act, if it has acted at all.³¹ Suspended quashing orders may reduce the risk of this happening, but it would entirely depend on length of the suspension and the conditions attached to it. In other cases, Courts have used declaratory relief in a way that minimises the disruption of quashing but still secures justice for the

³⁰ [2010] UKSC 5.

³¹ In *R (IJ (Kosovo)) v Secretary of State for the Home Department* [2020] EWHC 3487 (Admin) the High Court granted a declaration that the Home Office’s guidance on ‘Permission to work and volunteering for asylum seekers’ was unlawful (see [108]). That declaration was made on 18 December 2020 and the guidance has not been amended as of April 2021. In *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979, the High Court held that the Home Secretary acted unlawfully in changing her policy on mental illness in detention, but no action was taken to amend the policy and/or publish an equality impact assessment for a considerable period. In *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 the Supreme Court made a declaration relating to the ‘bedroom tax’ regulations; that judgment was handed down on 9 November 2016 but the impugned provisions were not amended until 1 April 2017. The replacement provisions were not applied with retrospective effect.



individual.³² We are unconvinced that suspended quashing orders would in practice be any better at securing relief for successful claimants than a declaration would in most challenges to statutory instruments.³³ Again, this is why it is important that the decision as to the most appropriate remedy in each case should be left to judicial discretion.

31. Regarding precedent, we do not think that great weight should be placed on the section 102 of the Scotland Act 1998 and the other devolution acts. These precedents are specific to devolution challenges. Devolution issues arise in a very small number of judicial review case and introducing suspended quashing orders in other judicial review cases would be a significant expansion. Anecdotally, our discussions with Scottish practitioners indicate that few of them had come across section 102 in practice – suggesting it is rarely relied upon (although we are not aware of statistics or published evidence about its use). Furthermore, devolution cases are unique in that they often involve inter-Governmental disputes between the UK Government and Devolved Administrations, and as such are of a unique type of case, distinct from the vast majority of judicial reviews.

Suspended quashing orders: additional issues

32. There are further issues with the proposed changes. Far from promoting certainty, suspended quashing orders will give rise to significant uncertainty and the prospect of protracted legal proceedings. Suspended quashing orders are likely to give rise to post-judgment satellite litigation, increasing costs for both Claimants and public bodies.

33. Contrary to the Government's aims, the proposal also increases the likelihood of courts being invited to consider matters which they may consider are better left

³² In *Tigere* [2015] UKSC 57 the Supreme Court did not quash the offending provision of the SI being challenged (even though the Claimant sought this) but instead made a declaration. The Government introduced an interim policy to deal with transitional issues, based on the suggestion of Lord Hughes in the judgment. The Government then consulted and introduced new legislation at a later point. Importantly, this meant that the immediate injustice to the Claimant and those in a similar position to her was remedied before the replacement SI was introduced.

³³ These concerns were shared by David Elvin QC (see Landmark Chambers' webinar on the Independent Review of Administrative Law: <https://www.youtube.com/watch?v=T1QhThUtwol>)



to the legislature and the executive. Courts would be drawn into arguments concerning the implementation of the judgment and the practical and political considerations around consulting on new measures or introducing remedial legislation. It will be very difficult for other parties to counteract Government arguments, in particular those that concern the Minister's ability to lay legislation within a particular timeframe.³⁴

34. It has been suggested³⁵ that suspended quashing orders may be preferable to retrospective legislation being put in place in response to an immediate quashing order.³⁶ Whilst agreeing that legislating retrospectively is in general inimical to the rule of law, it may be necessary in some cases where measures have been found to be unlawful but need to be preserved for a short period while replacement legislation is developed, or to reverse the effect of an ultra vires piece of legislation. Further, nothing in the suspended quashing order framework would prevent retrospective legislation from being passed.

³⁴ Timeframes for secondary legislation are likely to depend on, for example, other political priorities within the Department, need for internal sign off e.g. from the Treasury for money matters, drafting resource, the Parliamentary calendar and availability of slots for SI debates.

³⁵ JUSTICE submission to IRAL (available here: <https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/>).

³⁶ As was the case in *Ahmed v HM Treasury (No 2)* [2010] UKSC 5.



Question 2

Do you have any views as to how best to achieve the aims of the proposals in relation to *Cart* Judicial Reviews and suspended quashing orders?

Suspended quashing orders

35. We have addressed the proposals in respect of suspended quashing orders in our answers to Q1 above and Q6 below. PLP does not support legislating for suspended quashing orders. However, if the Government proceeds with its plans to introduce suspended quashing orders, we favour the solution proposed by the IRAL panel, which would give a broad discretion to the court to suspend the effect of a quashing order. We consider that the formulation in s102 of the Scotland Act 1998 is too broad and not appropriate to a general power to suspend a quashing order. We agree with the IRAL panel that it should be left to the courts to develop the criteria or factors to be taken into consideration when deciding whether to suspend a quashing order. We are strongly opposed to any presumption in favour of suspending a quashing order, or any mandating of suspension in any particular case.

***Cart* judicial review**

36. PLP opposes the proposal to abolish *Cart* judicial reviews for the following three reasons which are explained in more detail below:

- (a) The recommendation of the IRAL panel proceeded on the basis of a fundamental error of fact as to the number of *Cart* judicial reviews which are successful. This error has been carried over into the Consultation Paper.
- (b) The availability of judicial review of a decision of the Upper Tribunal is a vital safeguard for important cases and ensures that errors of law are not perpetuated and that the Upper Tribunal is not insulated from external



scrutiny. There are critical differences between the High Court and the Upper Tribunal which mean that, although they are intended to be of equivalent status, it remains appropriate for the High Court to be able to review the unappealable decisions of the Upper Tribunal in limited circumstances.

- (c) Contrary to the suggestions in the Government consultation paper, there was nothing new or unusual about the decision that the Upper Tribunal should be amenable to judicial review. Its predecessor Tribunals had been so amenable and the Supreme Court was right to hold that Parliament had not ousted judicial review in enacting the Tribunals, Courts and Enforcement Act 2007.

37. In short, the streamlined procedure for *Cart* judicial reviews contained in CPR 54.7A provides a proportionate means of achieving the aim – which the Government commends³⁷ – of ensuring “some overall judicial supervision of the decisions of the Upper Tribunal... in order to guard against the risk that errors of law of real significance slip through the system.”

38. In view of the significant error of fact underpinning IRAL’s recommendation to abolish *Cart* judicial reviews, the Government should conduct and publish further research to understand the correct position based on a correct understanding of the procedure, before proceeding any further.

Fundamental error as to the number of successful *Cart* cases

39. We reproduce the IRAL Report’s table showing the Panel’s analysis of the number of *Cart* judicial reviews³⁸ below. This is the basis for the recommendation and the Government’s response. We analyse below the accuracy of the Panel’s conclusion as to the success rate. However, it is worth noting that the headline figures as to the number of applications may not be entirely reliable: the figures are drawn from the Administrative Court’s COINS database. First, accuracy of case categorisation within that database depends on the correct categorisation by the

³⁷ Consultation at para. 51.

³⁸ IRAL Report at para. 3.45.



member of Administrative Court Office staff who entered the case into the database. The IRAL Report acknowledges that its analysis is based in part on ‘mapping’ of the defendant to case type.³⁹ Second, it appears the data are drawn from England and Wales only: there is no consideration of data from Scotland or Northern Ireland despite the fact that this is the sole proposal in relation to which it is proposed to implement reforms which affect a reserved matter and would be applicable across the United Kingdom. Thirdly, the number of applications each year varies significantly, ranging from 161 in 2012 to 1159 in 2015. In the last two years for which data are provided in the report the numbers were 617 and 645.⁴⁰ A focus on the mean across an eight-year period may be unhelpful. Fourth, there are conflicting figures given both in different parts of the IRAL Report and in other public data.⁴¹

| Year | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
|----------------------------|------------------|------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|--------------|
| No. of applications | 161 | 672 | 776 | 1,159 | 683 | 789 | 617 | 645 | 5,502 |
| No. of reports/transcripts | 10 ⁵⁵ | 11 ⁵⁶ | 7 ⁵⁷ | 5 ⁵⁸ | 3 ⁵⁹ | 1 ⁶⁰ | 4 ⁶¹ | 4 ⁶² | 45 |
| No. of “positive” results | 2 | 3 | 2 | 2 | 1 | 0 | 1 | 1 | 12 |

40. Turning to the ‘success rates’: the 0.22% figure is compelling. Proportionate use of judicial resource is a legitimate concern in a justice system (indeed it was a key facet of the Supreme Court’s decision in *Cart*). However, it is seriously misconceived. The core flaw with the figure is that it is built out of reported cases, of which there were only 45 found by the Panel. There are two reasons this approach is problematic.

41. First, the headline success rate number is misleading. On the basis of the outcomes the panel had access to via legal databases, the success rate figure would be 12 out of 45 cases, not 5,502. This would represent a success rate of

³⁹ IRAL Report at para D5 (p159).

⁴⁰ The links in Appendix D of IRAL’s Report to the data tables are broken.

⁴¹ Figure 21 on p.172 of the IRAL Report lists 5659 *Cart* Judicial review cases between 2000 and 2019 (suggesting 157 *Cart* Judicial review cases issued before 2012), and Fig.23 lists 4083 between 2015 and 2019 (the table above has 3893 during this period). Dr Joanna Bell reports that “there are 6,293 cases dating back to 2012 which are labelled ‘Cart- immigration’ (5,870) or ‘Cart – other’ (423)” in the most recent Civil Justice and Judicial Review data tables published by the Ministry of Justice: Joanna Bell, “Digging for Information about *Cart* Judicial review cases” (UK Constitutional Law Blog, 1 April 2021).



26.7%. Why not use this figure instead? The figure being relied on artificially deflates the actual success rate by taking 5,457 cases — where we have no data on the outcomes — and assuming they were all failures. There is no basis for that assumption. What has resulted from this approach is manifestly flawed to anyone who knows this jurisdiction.⁴² The better approach would be to admit that we do not know success rates.

42. Second, *Cart* cases are not generally reported because – at least in England and Wales⁴³ – they go through a specific procedure, the dynamics of which means reported successful cases are unlikely. CPR54.7A lays down the streamlined procedure adopted for *Cart* judicial review cases, adopted precisely in order to (further) limit the amount of judicial resource they required. This includes the following rules:

- Only *Cart* Judicial review cases can be included in the claim form, any other claim (e.g. for unlawful detention) has to be brought separately (54.7A(2));
- The deadline for issuing a *Cart* JR is 16 days after the date on which the Upper Tribunal refusal of permission was sent (54.7A(3)), instead of the usual 3 months;
- There is a higher threshold for permission to be granted, reflecting the limited circumstances in which the Supreme Court held that *Cart* JR should be permitted (54.7A(7));
- There is no oral renewal if permission is refused on the papers (54.7A(8)).

⁴² We note that ILPA in its consultation response has – in the limited time available to respond to the consultation – obtained information about 52 such cases. We would also draw attention to the response submitted by barristers at One Pump Court chambers which gives five compelling case studies of successful but unreported *Cart* Judicial review cases.

⁴³ PLP does not have expertise in judicial review procedure in Scotland. However, we understand from colleagues in Scotland that although there is no similar separately procedure for *Cart* Judicial review cases (*Eba* Judicial review cases), it is common for cases which are granted permission to settle by the parties agreeing that the refusal of permission by the Upper Tribunal should be reduced (quashed) before a hearing.



43. Importantly, CPR54.7A further states:

(9) If permission to apply for judicial review is granted –

(a) if the Upper Tribunal or any interested party wishes there to be a hearing of the substantive application, it must make its request for such a hearing no later than 14 days after service of the order granting permission; and

(b) if no request for a hearing is made within that period, the court will make a final order quashing the refusal of permission without a further hearing.

(10) The power to make a final order under paragraph (9)(b) may be exercised by the Master of the Crown Office or a Master of the Administrative Court.

44. Under this procedure, hearings – and therefore reported judgments – are inevitably extremely rare. If permission is granted, it is unusual for the Upper Tribunal or Secretary of State to request a hearing. Instead, the usual course is that there is no such request, and the Master quashes the decision of the Upper Tribunal that refused permission. The case then goes back to the Upper Tribunal, where an Upper Tribunal Judge reconsiders whether to grant permission (and in practice, usually does so). Typically, this is all done on the papers with limited written reasoning. It would be highly unusual for this process to be reported or for there to be any judgment to be found on databases such as BAILII or Westlaw. That success in the judicial review system does not usually come in the form of a judgment but some other resolution is recognised elsewhere in the Report, but not in relation to *Cart* cases.

45. Given this procedure, a better starting point for ascertaining the success rates in *Cart* judicial review cases would be the number of *Cart* cases granted permission. Dr Joanna Bell has calculated from published data from the Administrative Court that 366 cases were granted permission.⁴⁴ That is a very different figure from

⁴⁴ See Joanna Bell, “Digging for Information about *Cart* Judicial review cases” (UK Constitutional Law Blog, 1 April 2021). Bell also notes a further 446 cases in which the outcome is unknown. Ministry of Justice officials at a Bar Council webinar on the consultation on 22 April 2021 suggested there were 339 cases which had been granted permission.



12 and shows that the *Cart* jurisdiction has indeed operated as a valuable safeguard against injustice.

46. In order to fully understand the success rate it would be necessary to ascertain what had happened to those cases *after* permission was granted: since very few proceeded to a substantive hearing⁴⁵ it may be inferred that following the grant of permission, no hearing was requested and the refusal of permission to appeal to the Upper Tribunal was quashed.

47. It appears that from at least from 2017 onwards, IRAL has included some reported Upper Tribunal decisions, following the grant of permission to appeal further to a *Cart* judicial review, in its analysis. However, it is unclear why no Upper Tribunal cases from before 2017 have been included, or how those which have been included were selected; not all Upper Tribunal cases are reported (and not all unreported decisions are published); it will not always be apparent from an Upper Tribunal decision that it was preceded by a *Cart* judicial review; and some *Cart* judicial review cases will result in the parties agreeing, or the Upper Tribunal deciding, without a hearing and without a reasoned judgment being issued by the Upper Tribunal, that the matter should be remitted to the First-tier Tribunal for a *de novo* hearing. It would also be necessary to consider whether any Upper Tribunal cases, which appeared to be “unsuccessful” (in that the Upper Tribunal had not found an error of law in the decision of the First-tier Tribunal), had subsequently been successfully appealed.⁴⁶

What does ‘success’ mean in a *Cart* judicial review?

48. The IRAL panel adopted in PLP’s view an unduly narrow definition of success in a *Cart* JR. In PLP’s view, the objective of a *Cart* JR will have been achieved whenever the refusal of permission to appeal by the Upper Tribunal is quashed, whether by consent or otherwise. That is because the judicial review will have played its vital role in safeguarding access to the Upper Tribunal in cases which

⁴⁵ There were 9 substantive hearings according to data referenced by an MoJ official at the Bar Council webinar on 22 April 2021.

⁴⁶ PLP’s Legal Director has experience of a case in which the Upper Tribunal dismissed an appeal on the basis that the FTT did not err in law, following a *Cart* JR; permission to appeal to the Court of Appeal was obtained and the Home Secretary then agreed that the appeal be allowed by consent and remitted to the FTT for a *de novo* hearing.



raise important issues of principle or practice, or where there are other compelling reasons for them to be heard.

49. This is a vital safeguard that should not be so readily dismissed. As the Government recognised in its response to the IRAL Report, the removal of this route “may cause some injustice.”⁴⁷ The nature of the potential injustice at issue has unfortunately received no attention at all, even though it is important. In the Administrative Appeals Chamber, many appeals concern access to benefits designed to prevent destitution and homelessness or to meet the additional living costs of disabled people. In the Immigration and Asylum Chamber, for example, almost all cases involve asylum and human rights appeals. The potential injustices at stake concern the most fundamental rights and may literally be a matter of life and death.⁴⁸ The cases that succeed in a *Cart* judicial review also — by definition — involve important points of law or practice, which would otherwise not be considered, or compelling reasons such as a complete breakdown of fair procedure. In any full assessment of the proportionate use of judicial resource, account needs to be taken of the weight of the interests. It is worth recalling the “special factors” identified by the Court of Appeal in *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 as to why judicial review of the refusal of permission to appeal by the Immigration Appeals Tribunal was justified:

In asylum cases, and most cases are asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture. The number of applications for asylum is enormous, the pressure on the tribunal immense and the consequences of error considerable. The most anxious scrutiny of individual cases is called for and review by a High Court judge is a reasonable, if not an essential, ingredient in that scrutiny.⁴⁹

See further, *per* Lord Dyson in *Cart* itself:

The High Court’s supervisory jurisdiction to correct any error of law in unappealable decisions of the predecessors of the UT has been beneficial for the rule of law. There is a real risk that the exclusion of judicial review will lead to the fossilisation of bad law ... [t]here are also risks in restricting the judicial review jurisdiction in relation to errors of law in unappealable decisions of tribunals in cases involving fundamental rights and EU law. In such cases, if the

⁴⁷ Consultation at para. 52.

⁴⁸ See the case studies cited by ILPA and barristers at One Pump Court chambers in their Consultation Responses.

⁴⁹ *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 at [52].



UT makes an error of law in refusing permission to appeal, the consequences for the individual concerned may be extremely grave... [i]n asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture.⁵⁰

50. Moreover, there is a wider public interest at stake. Even when the Upper Tribunal ultimately concludes that the First-tier Tribunal did not err in law, or any error it made was not material, the importance of ensuring that the First-tier Tribunal is not isolated from challenge and that the Upper Tribunal does not become insulated justify the proportionate and limited use of judicial resource in a *Cart* judicial review. Importantly, there is the possibility of an appeal to the Court of Appeal from the decision of the Upper Tribunal, so that any error of law by the Upper Tribunal is not immune from review (where the second appeals test is met). The question of law will be “channelled into the legal system”⁵¹ which will meet the public purpose of ensuring “public confidence in the administration of justice and, in appropriate cases, to clarify and develop the law, practice and procedure and to help maintain the standards of... tribunals”.⁵²

51. This point arises from an important distinction between the Upper Tribunal and the High Court. The Upper Tribunal is a statutory tribunal of limited jurisdiction. The High Court is a creature of the common law with an inherent and unlimited jurisdiction. Upper Tribunal judges are specialists in their fields. In the Immigration and Asylum Chamber they have specialist knowledge of immigration and asylum law, practice and procedure. However, this does not mean that they are infallible⁵³ and errors of law will inevitably arise in any jurisdiction. Account needs to be taken of the danger of a ‘local law’ building up in a jurisdiction which is immune from external influence. As Lady Hale noted in *Cart*, there is an important difference between the ordinary courts such as the county court (where the risk exists but is likely to be corrected elsewhere and put right) and the specialist tribunal system (where the risk is “much higher... however expert and high-powered they may be”). As she explained:

The judge in the First-tier Tribunal will follow the precedent set by the Upper Tribunal and refuse permission to appeal because he is confident that the Upper

⁵⁰ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [112]

⁵¹ *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859 at [30] (Sedley LJ). See also *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [43] and [52] (Lady Hale).

⁵² *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [68] (Lord Phillips).

⁵³ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [37] (Lady Hale): “no-one is infallible”.



Tribunal will do so too. The Upper Tribunal will refuse permission to appeal because it considers the precedent to be correct. It may seem only a remote possibility that the High Court or Court of Appeal might take a different view. Indeed, both tiers may be applying precedent set by the High Court or Court of Appeal which they think it unlikely that a higher court would disturb. The same question of law will not reach the High Court or the Court of Appeal by a different route. There is therefore a real risk of the Upper Tribunal becoming in reality the final arbiter of the law, which is not what Parliament has provided.⁵⁴

52. It follows that a *Cart* judicial review should be categorised as a 'success' where it has led to the refusal of permission to appeal to the Upper Tribunal being quashed, regardless of the outcome of the appeal. It will have served its purpose of ensuring that, at least in the limited category of cases in which the high threshold for *Cart* review is crossed, errors of law in the Tribunal system do not go uncorrected but, because of the possibility of appeal from the Upper Tribunal, are channelled into the legal system.

Parliament did not create a statutory ouster

53. The Supreme Court was right to hold in *Cart* that Parliament had not legislated to exclude judicial review of the Upper Tribunal. There was nothing in the Tribunals Courts and Enforcement Act 2007 which would have excluded judicial review of the Upper tribunal.⁵⁵ The mere designation of the Upper Tribunal as a 'superior court of record' could not achieve this result⁵⁶ contrary to what is suggested at para 51 of the consultation paper. Excluding judicial review would require the most clear and explicit language which is not present.⁵⁷ The Leggatt Report on Tribunals had recommended such an explicit ouster but that recommendation was not adopted by Parliament.⁵⁸ Indeed, by the time the case reached the Supreme Court, this was not even argued by the Government.⁵⁹ Nor

⁵⁴ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [42]–[43]. See further [56].

⁵⁵ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [29].

⁵⁶ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [37] and [86].

⁵⁷ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [37].

⁵⁸ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [118].

⁵⁹ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [1]: "It is no longer argued on behalf of the Government that such decisions are not amenable to judicial review at all. But it is argued that they are only reviewable in exceptional circumstances" (Lady Hale). See also [87] (Lord Phillips) and [108] (Lord Dyson).



did its finding create any novel jurisdiction: judicial review by the High Court of refusal of permission to appeal by the predecessors to the Upper Tribunal, such as the Immigration Appeals Tribunal, had always been available.⁶⁰ Therefore, in legislating to reverse the effect of *Cart*, Parliament would not be 'restoring' what was intended in 2007, it would be creating a new ouster, with very serious potential consequences.

Judicial resources

54. Another consideration is the amount of judicial time which is required to consider *Cart* judicial reviews. The consultation paper does not contain any information on this but indicates that it is being sought from HMCTS. Bearing in mind the streamlined procedure for considering *Cart* judicial reviews, it is anticipated that the amount of judicial time involved in each case will be very limited having regard to:

- (1) The requirement that the *Cart* JR be issued separately from any other JR;
- (2) The fact that there is only a paper consideration of permission with no right to oral renewal unless directed by the court;
- (3) The fact that most such cases are disposed of by a quashing order following the permission stage and do not proceed to a final hearing;
- (4) The provision for such quashing orders to be made by a Master.

55. It is also rare for the Upper Tribunal or the respondent to engage in the permission proceedings.

56. Given the importance of what is at stake in *Cart* judicial reviews, both for the individuals concerned and for the wider public interest in ensuring that the tribunals system does not become isolated from scrutiny, the very significant benefits for the rule of law justify this limited and proportionate use of judicial

⁶⁰ See *R (Cart) v Upper Tribunal* [2011] UKSC 28 [16]–[21] and [45]–[46] (Lady Hale). Albeit in respect of immigration appeals, between 2005 and 2010, this took the form of a paper review by a High Court judge under s103A, Nationality, Immigration and Asylum Act 2002. See Lord Dyson at [112].



resource.



Question 3

Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

57. PLP does not have the necessary expertise in the use of judicial review in Scotland and Northern Ireland to comment on the impact of the proposals in those jurisdictions. However, PLP has an ongoing interest in public law in Wales. We are concerned that the consultation fails to take into account the extent to which reform of judicial review would impact on devolved governance in Wales. The scope of the review was limited to the consideration of public law control of UK-wide and England & Wales powers (see Terms of Reference). The panel's principal concern was with "powers that may be exercised across the whole of the United Kingdom and are not devolved or transferred under one or more of the devolution settlements."⁶¹

58. Judicial review of administrative action is a reserved matter under Schedule 7A Part 1 8(1)(f) of the Government of Wales Act 2006.

59. A number of the responses to the IRAL expressed concern that the review excluded any consideration of judicial review of devolved matters and the "artificial and arbitrary barrier, based on a distinction between reserved and devolved aspects of Government, to proper consideration of reform to the institution of judicial review."⁶²

60. In particular, submissions from Public Law Wales and Dr Sarah Nason, on behalf of Bangor Law School Public Law Research Group, cautioned against the introduction of a dual system which could arise if reform to judicial review was limited to reserved matters only, given that there are circumstances where UK Government and Welsh Ministers may exercise concurrent or joint powers.

⁶¹ IRAL Report at para. 13.

⁶² Public Law Wales Group submission to IRAL at para. 15 (available here: <https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/>).



Furthermore, often in devolved matters, Welsh ministers will be acting under powers derived from a UK Act of Parliament, in which case the powers exercised by Welsh ministers are identical to those exercised by UK Government ministers.

61. PLP agrees with the analysis of Keith Bush QC and Dr Huw Pritchard, that “the particular way in which Welsh devolution has developed, beginning with an executive model based on the transfer of individual ministerial powers to the Welsh Government, including, in some cases, provision for these to be exercised concurrently or even jointly with UK Ministers, means that it can be illusory to classify executive powers exercisable in relation to Wales as either “devolved” or “reserved.””⁶³
62. These submissions, and the Panel’s report, stated that it would be highly undesirable for statutory intervention to result in a “dual” or “two-tier” system.⁶⁴
63. Despite this, however, the consultation does not address Wales as a distinct jurisdiction in which judicial review reform may have significant implications. Instead, it invites responses only in relation to the devolved nations of Scotland and Northern Ireland.
64. It is clear from the IRAL submissions that even Welsh Government has no appetite for reform of judicial review which may lead to a diminution in the availability and scope of judicial review. There is already a very low number of judicial review challenges brought in Wales, partially because of a lack of legal aid providers.⁶⁵
65. It is clear from the consultation document that the changes envisioned are not simply “minor and technical changes to court procedure in the Devolved Administrations” as suggested at page 4 of the Call for Evidence. Instead, the review could lead to substantive changes to remedies for judicial review and procedural issues. It is therefore clear that if statutory intervention creates a

⁶³ Keith Bush and Huw Pritchard, “Implications of the Independent Review of Administrative Law for Devolved Government in Wales” (*UK Constitutional Law Association Blog*, 22 October 2020).

⁶⁴ IRAL Report at para. 5.48.

⁶⁵ Liam Edwards and Sarah Nason, *Reviewing Judicial Review in Wales*, Bangor University Administrative Justice Research Reports (April 2021), available at <http://adminjustice.bangor.ac.uk/documents/Judicial-Review-in-Wales-April-2021-Full-Report.pdf>.



dual or two-tier system there will be significant differences for claimants depending on whether they are challenging a public body exercising powers which are reserved or devolved.

66. The Commission on Justice in Wales (CoJ) recently reported that the current devolution scheme, in which there is no devolution of powers in respect of police, probation, prisons, the courts and most areas of substantive law, is unnecessarily complex⁶⁶ and that maintaining a single law of England and Wales leads to increasing complexity and confusion.⁶⁷ To address this, the Welsh Government is embarking on process of classifying, categorising and codifying Welsh law. Senedd Cymru (the Welsh Parliament) has recently enacted the Legislation (Wales) Act 2019 with a view to making Welsh law more accessible, clear and straightforward to use.

67. Contrary to the need for clarification and simplification, the proposed changes to judicial review, given that there is inadequate consideration as to how “the availability of judicial review diverge[s] depending on whether the decisions challenged are those of Welsh Ministers or UK Ministers, even where the nature of those decisions are identical”⁶⁸, risk embedding more complexity and uncertainty into an already complex devolution scheme.

⁶⁶ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2020), available at <https://gov.wales/commission-justice-wales-report> at para. 2.30.

⁶⁷ Ibid at para. 12.122.

⁶⁸ Bangor Law School Public Research Group submission to IRAL at para. 93 (available here: <https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/>).



Question 4

(a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

68. PLP strongly disagrees with the proposal to legislate for prospective only remedies.⁶⁹ Save in the most exceptional circumstances, remedies which are prospective only will leave individuals without redress for an unlawful act: they therefore give rise to an injustice and undermine the rule of law. This result undermines the Conservative Party manifesto commitment to “ensure that judicial review is available to protect the rights of the individuals against an overbearing state.”⁷⁰ In the consultation document, the Government argues that “the Rule of Law may be best served by only prospectively invalidating such provisions.”⁷¹ On the contrary, the Rule of Law is not best served, but is considerably damaged, by insulating unlawful measures from challenge, and denying remedies to potentially large groups of people. Importantly, we do not think there is any need for reform in this area because Courts already use their discretion to grant prospective remedies in the exceptional cases where they are appropriate.

69. We note that prospective only remedies were not amongst IRAL’s proposed changes following its detailed and careful consideration of the evidence submitted by more than 200 respondents to its call for evidence, and considered

⁶⁹ A prospective only remedy means that “a decision or secondary legislative provision could not be used in the future (as it would be quashed), but its past use would be deemed valid.” (Consultation at para. 60).

⁷⁰ Conservative Party 2019 Manifesto p.48, available at <https://www.conservatives.com/our-plan>.

⁷¹ Consultation at para. 68.



with care and at length in its report. It is disappointing therefore that in advancing this proposal, the Government relies almost exclusively on the views of a single respondent, Sir Stephen Laws. Many legal commentators, including Government lawyers, share PLP's concerns about the idea of prospective only remedies.⁷²

Existing powers

70. Courts already have the ability to limit the retrospective effect of their rulings and/or grant prospective only remedies in exceptional circumstances.⁷³ By 2005, Lord Hope was able to confirm that “the ability of courts to make prospective rulings... can no longer be said to be in question.”⁷⁴ In *British Academy of Songwriters, Composers and Authors* Green J stated that “it is clear that the Court has a discretion to limit the [retrospective] effects of [a quashing] Order.”⁷⁵ In exercising its discretion with respect to remedies more generally, the court already takes into account “the needs of good administration, delay, the

⁷² Including Professor Mark Elliott (see “Judicial review reform I: Nullity, remedies and constitutional gaslighting”, *Public Law for Everyone*, April 6 2021, available at <https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/>); former Treasury Solicitor Sir Jonathan Jones (“The proposal that remedies might be available only prospectively could cause serious injustice to claimants who have already suffered a detriment, or been denied a benefit, by the time they bring their case”; *The Times*, “Judicial reviews must not be blunted in the name of politics”, 25 March 2021); and former Treasury Counsel David Elvin QC (see Landmark Chambers’ webinar on the Independent Review of Administrative Law: <https://www.youtube.com/watch?v=T1QhThUtwol>).

⁷³ Michael Fordham QC, *Judicial Review Handbook* (7th ed, 2021) 24.4.17; Sir Clive Lewis, *Judicial Remedies in Public Law* (6th ed, 2020) at 5-012-013; 5-030; 7-074-077; *De Smith’s Judicial Review* (8th ed, 2018), 4-073.

⁷⁴ *Re Spectrum Plus* [2005] UKHL 41 at [68] (Lord Hope), see also Lord Nicholls at [39] and Lord Scott at [124]. As was pointed out in that case, courts had already issued *de facto* prospective remedies in other contexts: see e.g. *Hall & Co v Simons* [2002] 1 AC 615, on tort liability immunity. By 2010 Lord Hope was able to identify “a considerable number of dicta to the effect that the court has a general inherent power to limit the retrospective effect of its decisions”: *Cadder v HM Advocate* [2010] UKSC 43 at [58].

⁷⁵ *R (British Academy of Songwriters, Composers and Authors v Secretary of State for Business, Innovation and Skills)* [2015] EWHC 2041 at [15]. Later at [19] Green J confirmed that the remedy issued in that case would be prospective only: “In the circumstances of this case I will declare that the Regulations are prospectively unlawful.”



effect on third parties, the utility of granting the relevant remedy.”⁷⁶

71. Whilst judges have confirmed that they already hold the power to issue prospective-only remedies, they have also held that doing so should be “exceptional”⁷⁷ in nature and those retrospective remedies should “generally”⁷⁸ remain the “normal” course of action.⁷⁹ A presumption that remedies should be retrospective in nature can be dislodged, but only where the retrospectivity would lead to “gravely unfair and disruptive consequences”⁸⁰ and a prospective remedy would be the “only just result” possible.⁸¹

72. As we set out below, we agree that *if* prospective-only remedies are to be used, they should be used only very exceptionally. However, in PLP’s view there is no need for legislation and there is no justification for widening the circumstances under which such relief is granted.

Purported justification for prospective remedies

73. The reasons given by the Government in favour of legislating for prospective only remedies are that this scheme would lead to greater certainty in relation to Government action; minimise costs to the taxpayer; and would reduce unfairness to people that have relied on the validity of a statutory instrument in the past.

74. PLP is not convinced by this rationale and it does not outweigh the very serious implications for the rule of law of legislating for prospective-only remedies, particularly if such remedies are made presumptive or even mandatory. It is doubtful that a prospective remedy involves any greater degree of certainty than a retrospective one; whilst retrospective invalidity achieves a neat outcome, prospective remedies mean that administrative actions may have different legal

⁷⁶ *Credit Suisse v Allerdale Borough Council* [1997] QB 306 (Hobhouse LJ).

⁷⁷ *Re Spectrum Plus* [2005] UKHL 41: prospective remedies should be applied “altogether exceptionally” ([41], (Lord Nicholls)); in an “exceptional category” of case ([43], Lord Nicholls)) in a “wholly exceptional case” ([74] (Lord Hope)). *R (Black) v Secretary of State for Justice* [2017] UKSC 81: prospective remedies “wholly exceptional”: [35] (Lady Hale).

⁷⁸ *Mossell (Jamaica) Ltd v Office of Utilities Regulations* [2010] UKPC 1 at [44]: “generally speaking” remedies should be retrospective (Lord Phillips).

⁷⁹ *Re Spectrum Plus* [2005] UKHL 41, [39]–[40] (Lord Nicholls); [71] (Lord Hope).

⁸⁰ *Re Spectrum Plus* [2005] UKHL 41, [40] (Lord Nicholls).

⁸¹ *Re Spectrum Plus* [2005] UKHL 41, [162] (Lady Hale).



effects at different points in time. As noted above, in the exceptional cases in which prospective-only remedies are appropriate, Courts already have the discretion to grant them, so there is no need to amend section 31 of the Senior Courts Act as proposed.

75. The Government relies on Sir Stephen Laws’ argument that “retrospective invalidation of legislation will, in almost all cases, impose injustice and unfairness on those who have reasonably relied on its validity in the past.”⁸² But there is little evidence for such an effect in “almost all cases” – in any case, those that “reasonably rely” on such provisions tend to be public bodies, who, as we argued above, are generally well-equipped to deal with ‘disruption.’

Prospective remedies risk a denial of justice

76. Regardless of the perceived benefits of prospective-only remedies, the fact is that in the vast majority of cases their essential effect is to deny individuals access to a remedy for unlawful conduct which has had an impact on them. Very rarely will the courts entertain challenges to prospective issues (*Wightman*⁸³ is a rare exception).⁸⁴ The vast majority of judicial review cases deal with past decisions or actions and involve identifying and correcting unlawfulness. Prospective remedies prevent this from taking place and frustrate the fundamental purpose of judicial review. The result, in all but the most exceptional of cases, is a flagrant denial of access to justice, a cardinal aspect of the rule of law.

77. Further, this denial of justice operates arbitrarily – those parties who bring claims are put at a disadvantage, being unable to benefit personally from a successful challenge, but others who are affected after this point will benefit. As Lord Nicholls put it, “the ability to obtain an effective remedy could depend upon

⁸² Consultation at para. 67.

⁸³ *Wightman v Secretary of State for Exiting the European Union* [2018] CSH 62.

⁸⁴ For example, three of Public Law Project’s recent challenges to the EU Settled Status Scheme all of which have been refused permission in the last three months for being premature since the deadline to apply to the EUSS is not until 30 June 2021. Two of the challenges were refused permission on the papers and the third was refused permission both on the papers and at oral hearing (see e.g. *R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department*) [2021] EWHC 638 (Admin)).



which of several challenges reaches the [court] first.”⁸⁵

78. The denial of a retrospective remedy may, in some cases, risk violating human rights obligations. Inherent in the right to a fair trial protected by Article 6(1) ECHR is the right to an effective remedy.⁸⁶ As noted above, prospective-only remedies are unlikely to be ‘effective’ if they deny redress to the individual bringing the case. Quashing a decision or measure in a way that prevents the Government from repeating the offending act in the future is not much use to an individual to whom an injustice has already been done. As noted above, this denial of justice to individuals who have been affected by unlawful state action is contrary to the manifesto commitment to protect the availability of judicial review to “protect the rights of individuals against an overbearing state.”

79. In cases where claimants are seeking to enforce their human rights, Article 13 ECHR may be infringed if past wrongs cannot be redressed.⁸⁷ Further, if claimants are prevented from seeking damages to compensate for breach of their rights then this is likely to engage Article 1 Protocol 1 ECHR. Monetary remedies may be sought in judicial review, and this is not uncommon in Human Rights Act cases.⁸⁸ The Administrative Court itself may award damages⁸⁹ or proceedings can be transferred to “the County Court or appropriate division of the High Court to determine the question of damages.”⁹⁰ If the High Court finds there has been a violation of an individual’s Convention rights but awards a remedy that is of prospective effect only, then they may be denied access to compensation to which they would currently be entitled, and indeed would be awarded if they took their case to Strasbourg. This not only risks seriously

⁸⁵ *Re Spectrum Plus* [2005] UKHL 41 at [27] (Lord Nicholls).

⁸⁶ *Běleš and Others v Czech Republic*, App No. 47273/99, 12 November 2002 at para. 49.

⁸⁷ Article 13 has not been incorporated into UK domestic law but the UK is bound by it as a matter of international law.

⁸⁸ Damages may be awarded in human rights claims under section 8 of the Human Rights Act 1998.

⁸⁹ Section 31(4) of the Senior Courts Act 1981 states that: “on an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if— (a) the application includes a claim for such an award arising from any matter to which the application relates; and (b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.”

⁹⁰ See Administrative Court Guide paragraph 11.9.3, available at https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf.



undermining the intention behind the Human Rights Act 1998 to “bring rights home” but could amount to a violation of the Convention. It is concerning that the Government is consulting on such changes at the same time that its Independent Review of the Human Rights Act is deliberating on the need for amendment to the Human Rights Act, and without reference to that ongoing work.

Prospective remedies: further issues

80. Prospective-only remedies would likely have a chilling effect on claimants bringing judicial review claims. The prospect of changes applying only in the future, rather than providing a solution to their own case, would likely dissuade many potential applicants from bringing cases.⁹¹ It could also be a significant barrier to individuals being granted legal aid in judicial review cases because in order for funding to be granted, the Legal Aid Agency must be satisfied that there is some direct benefit to the individual, a member of their family or the environment⁹². The result is that justice would be denied to most individuals and that any remaining judicial review litigation would become the preserve of the wealthy, corporations, and the few NGOs and charities that are able to fund cases themselves. This is inconsistent with the manifesto commitment to ensure judicial review remains available to protect individuals from an overbearing state.

81. The proposed scheme would transfer too much power to Government. As Professor Mark Elliott noted, the proposal would

in effect, enable the Government to legislate at will, confident in the knowledge that anything done under the colour of such secondary legislation — however

⁹¹ *Re Spectrum Plus* [2005] UKHL 41, [27] (Lord Nicholls).

⁹² One of the criteria that must be met for ‘legal help’ to be granted (legal aid covering initial advice on a judicial review case) is that there is “sufficient benefit to the individual” (see Regulation 32 of the Civil Legal Aid (Merits Criteria) Regulations 2013). When it comes to being granted a legal aid certificate in a judicial review case that it is not primarily a claim for damages the “reasonable private paying individual test” must be satisfied (see Regulation 42). Regulation 7 states that “the reasonable private paying individual test is met if the Director [of Legal Aid] is satisfied that the potential benefit to be gained from the provision of civil legal services justifies the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case”.



blatantly unlawful it might be — would be functionally lawful up to the point of the issuing of any relief, thanks to the courts’ inability retrospectively to invalidate it.⁹³

82. Far too much weight is placed on convenience for the Government rather than the vital importance of remedying unlawful conduct. As above, the Government is in a better position to bear this inconvenience than individuals are to be denied a remedy. Despite this, the proposals place the burden on the Claimant to show why it should have a remedy, even though it has already shown the public body’s action was unlawful.

83. Despite heralding the benefits of “certainty” the Government’s proposals are likely to generate significant uncertainty in practice,⁹⁴ with regards to whether, and how, a prospective remedy should be made. The proposed parameters do not help matters much. What is a “significant administrative burden”? What are “exceptional economic implications”? What is “injustice” in this context? Abundant satellite litigation may be required in order to answer these questions.

⁹³ Mark Elliott, “Judicial review reform I: Nullity, remedies and constitutional gaslighting”, *Public Law for Everyone*, April 6 2021, available at <https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/>.

⁹⁴ As Lord Nicholls put it in *Re Spectrum Plus* [2005] UKHL 41, “whatever its faults the retrospective application of court rulings is straightforward” ([26]).



Question 5

Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

84. No, we do not agree. PLP's position is that the correct balance has already been struck by the courts, in the provision of remedies for unlawful Statutory Instruments (SIs) and that there should be no change to the current law. We note that IRAL did not recommend any change to the approach to remedies for unlawful SIs.

85. The consultation paper states that it is contrary to the rule of law for individuals who have ordered their affairs around laws to have them retrospectively quashed.⁹⁵ While PLP acknowledges that there can be implications for third parties of retrospective quashing, this statement gives inadequate weight to the importance, in a democracy governed by the rule of law, for the Government to act in accordance with the law. If unlawful statutory instruments are not retrospectively quashed, this has serious implications for the rule of law and for those affected by the unlawful rules, who will remain subject to the effects of laws that the courts have deemed unlawful.

86. As the law stands, the courts very rarely retrospectively quash statutory instruments. Even where the courts do find delegated legislation unlawful, it does not mean that it is inevitably “struck down.” Instead, there is a nuanced “endgame” after the judgment, which often gives the Government space to implement the decision. The quashing of statutory instruments is an important power, but it is a discretionary power that is rarely used.

⁹⁵ Consultation at para. 67.



87. We reviewed all (reported) final decisions handed down by the High Court and Court of Appeal of England and Wales, as well as the UK Supreme Court, between 2014 and 2020 in which the lawfulness of delegated legislation was successfully challenged.⁹⁶

88. We found that in the last six years there have been 23 successful challenges to SIs in the High Court, 8 in the Court of Appeal and 6 in the Supreme Court. In only 10 of those 37 decisions did the courts quash a statutory instrument as a remedy. 4 decisions related to the same 2 SIs, and one of the decisions quashed the SI only prospectively. This means that 7 SIs have been retrospectively quashed over a period of 6 years, compared to an average of 1500-2500 SIs laid per year by the Government.⁹⁷

89. Furthermore, the court always assesses the effects of quashing an instrument on third parties who have relied on the law and already exercises its discretion to prospectively quash statutory instruments, where prospective quashing is required in the interests of legal certainty and the rule of law. For example, in *British Academy of Songwriters, Composers and Authors, Musicians' Union v The Incorporated Society of Musicians*, the court was of the view that the regulations addressed far-reaching and complex issues of copyright law and so it was not appropriate for the court to retrospectively quash them.⁹⁸

90. Even in human rights cases, the court is extremely hesitant to retrospectively quash statutory instruments. Of the 14 cases in which human rights challenges to delegated legislation succeeded in the last six years, the court quashed or otherwise disapplied the offending provisions in just four of them.⁹⁹ In *Tigere*, in

⁹⁶ We used the databases available at www.bailii.org and on Westlaw to carry out this research.

⁹⁷ The table in the Appendix to this response identifies the 37 cases and the remedy granted in each case, as well as identifying the level of court and whether the decision was based on Human Rights Act grounds.

⁹⁸ *R (British Academy of Songwriters, Composers and Authors and Others v Secretary of State for Business, Innovation and Skills)* [2015] EWHC 2041 (Admin).

⁹⁹ See Joe Tomlinson, Lewis Graham and Alexandra Sinclair, "Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?" (UK Constitutional Law Association Blog, 22 February 2021). The cases were *R. (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37; *R (British Medical Association) v Secretary of State for Health and Social Care* [2020] EWHC 64 (Admin); *R (Elmes) v Essex CC* [2018] EWHC 2055 (Admin); *R. (RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin).



which the Supreme Court found that the applicant's settlement status prevented her from accessing student loans, Lady Hale, for the majority, ruled that the claimant was "clearly entitled to a declaration that the application of the settlement criterion to her is a breach of her rights" but declined to quash the instrument, which "[left] it open to the Secretary of State to devise a more carefully tailored criterion which will avoid breaching the Convention rights of other applicants, now and in the future."¹⁰⁰

91. The consultation document refers to the "wide and retrospective quashing" of SIs by the courts, but this is not borne out in the evidence. In practice, the courts are extremely careful to tailor any order as narrowly as possible to afford a remedy while ensuring other parts of the law are unaffected. In cases such as *R (Carmichael & Others) v SSWP* [2016] UKSC 58, the courts carefully restricted the scope of their ruling to the specific aspects of the scheme which failed to pass scrutiny. As the law stands, the court is exercising its power in a judicious and circumscribed manner. It is unnecessary to remove or limit that discretion when it is already being exercised properly.

92. The consultation response states that, "Because of their scrutiny, Parliament-focused solutions are more appropriate where statutory instruments are impugned." This statement vastly overestimates the level of scrutiny that statutory instruments receive from Parliament. The Hansard Society has reported that the standard ratio is that 80% of SIs are passed using the negative resolution procedure and 20% are passed with the affirmative resolution procedure.¹⁰¹ This means the vast majority of the statutory instruments made in the United Kingdom are never debated at all and are subject to virtually no Parliamentary scrutiny. Six out of the 14 successful challenges to statutory instruments under the Human Rights Act over the last six years were instruments made via the negative resolution procedure.¹⁰²

93. Furthermore, the courts are conscious of when instruments have received

¹⁰⁰ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

¹⁰¹ Hansard Society, "Westminster Lens: Parliament and delegated legislation in the 2015–16 session" (2017) at p.4, which showed 19% of SIs were affirmatives in the 2015–2016 parliamentary session.

¹⁰² Joe Tomlinson, Lewis Graham and Alexandra Sinclair, "Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?" (UK Constitutional Law Association Blog, 22 February 2021).



parliamentary debate and take that into account when deciding whether to declare the instrument unlawful. In the case of *MA Dyson* MR said the following:

[a] factor that is relevant to the intensity of the court's review of the scheme is that the Regulations were approved by affirmative resolution in both Houses of Parliament. That is not a bar to judicial review, but it is a factor which must be firmly borne in mind. When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful.¹⁰³

94. It is PLP's position that there should be no change to the law. We are opposed to the idea of prospective-only remedies generally, but we are firmly set against any suggestion that they should be mandatory or presumed to apply. Even those who have found merit in the possibility of *some* prospective remedies¹⁰⁴ have framed it as an exception to the norm.

95. Option (b) would remove any discretion from the courts and mean for example that negative procedure SIs which have passed with no parliamentary scrutiny could never be quashed unless the extremely high test of "exceptional public interest" is met. The courts already take into account all of the factors outlined in the consultation response, including legal certainty and the rule of law, which is why they have only retrospectively quashed 7 instruments in the last six years. All option (b) does is to remove an important tool from the judicial toolbox that judges already reserve for the rarest of circumstances.

Case studies

96. *RF v Secretary of State for Work and Pensions*,¹⁰⁵ PLP represented the Claimant in this challenge to the DWP's Personal Independent Payment Scheme (PIP). The High Court found that the rules were "*blatantly discriminatory against those with mental health impairments*" and quashed the relevant part.¹⁰⁶ However, a prospective only remedy would have denied thousands of people with mental health conditions the financial support to which they were entitled. While some of the individuals may have, with assistance from support workers or advisers,

¹⁰³ *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 14 at [57].

¹⁰⁴ Sir Clive Lewis, *Judicial Remedies in Public Law* (6th ed, 2020) at 5-032 and 7-078.

¹⁰⁵ [2017] EWHC 3375 (Admin).

¹⁰⁶ See [59].



sought to have their claim re-assessed by the DWP in light of the judgment, this would have been out of reach for many, and would in any case not have rectified the past discriminatory denial of benefit based on the unlawful regulations. In cases such as these it is entirely proper that the state take the necessary action to address its own previous wrongdoing, even if this is costly and burdensome. In any event, and as the Institute for Government has noted, the problems with the PIP scheme were well known within the DWP prior to the Court judgment but political factors meant that it had not taken action.¹⁰⁷

97. In *R (British Blind and Shutter Association) v Secretary of State for Housing, Communities and Local Government*¹⁰⁸ the High Court quashed Regulation 2(6)(b)(ii) of the Building Regulations 2010, which banned the use of external blinds and shutters attached to residential high-rises in the aftermath of Grenfell. The claimant was the sole trade association for the manufacturers of blinds and shutters. The Court found that the consultation preceding the regulations had been unfair and unlawful, and that there was a lack of evidence showing that the banned blinds and shutters created a fire risk. The decision to retrospectively quash was limited to the very narrow provision in question, leaving unaffected the remainder of the crucial Building Regulations. Not only would a prospective quashing order have been unnecessary given the offending regulation was severable from the rest of the law, it would have also denied justice for the businesses whose products, despite their safety, had become unlawful and remained so for almost an entire year as a result of the overbroad provision.

Conclusion on prospective remedies and statutory instruments

98. In proposing prospective-only remedies in relation to SIs, the Government states that it “considers that legal certainty, and hence the Rule of Law, may be best served by only prospectively invalidating such provisions.” We question the ‘certainty’ provided by the proposals. In any case, it is dangerous to reduce the rule of law to the need for certainty. The rule of law also requires justice and fairness, and for redress to be accessible. This is recognised in the manifesto

¹⁰⁷ Catherine Haddon, Raphael Hogarth and Alex Nice, “Judicial Review and policy making: the role of legal advice in Government” (Institute for Government, 2021), available at <https://www.instituteforGovernment.org.uk/publications/judicial-review>, p.15.

¹⁰⁸ [2019] EWHC 3162 (Admin).



commitment to ensure that judicial review remains available for individuals to protect their rights against an overbearing state. These proposals do not serve the rule of law; they significantly threaten it.



Question 6

Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

99. At paragraph 69 of the consultation document the Government proposes that either a *presumption* should operate whereby a quashing order should be suspended, or that it should be a *requirement* that quashing orders will be suspended, unless there is an exceptional public interest not to do so.
100. It should be noted that whilst IRAL did recommend legislating for suspended quashing orders, it did not contemplate that such a remedy would be mandatory or presumptive. Rather, it suggested that “it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded.”¹⁰⁹
101. We agree with IRAL that the Courts are best placed to develop remedies that work in practice. We are not in favour of legislating for suspended quashing orders in general and are particularly concerned by proposals to make such orders presumptive or mandatory. The problems identified above would only be exacerbated by such an approach, all the while reducing the scope for flexibility which the Government seeks to give to courts in this area.¹¹⁰ The burden is placed squarely on the claimant, who has already dislodged the burden of showing that a public body's decision or action is unlawful.
102. Adding an “exceptional public interest” exception to a presumption that quashing orders should be suspended does little to mitigate the harshness of such a presumption. It is *already* in the public interest that quashing orders apply immediately and retrospectively. Further, on a practical level, elucidating the

¹⁰⁹ IRAL Report at para. 3.67–3.69.

¹¹⁰ See our response to Question 1.



meaning of “exceptional public interest” is likely to be very difficult.

103. The least objectionable of the approaches suggested by the Government is the first option at paragraph 56: legislating for the *possibility* that a court may issue a suspended quashing order, and setting out criteria that the court *may* take into account when considering whether to do so.
104. In this context, the starting point must be a presumption in favour of relief – as De Smith states, “[t]he general approach ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order.”¹¹¹ Any proposed criteria thereafter should be non-exhaustive, and courts should be free to depart from it where necessary.
105. The Government Response suggests the following criteria for the Court to take into account:

(a) whether the procedural defect can be remedied

(b) whether remedial action to comply with a suspended order would be particularly onerous/complex/costly

(c) whether the cost of compensation for remedying quashed provisions would be excessive

These criteria are weighted towards the interests of the public body, despite the fact that it is the public body that has been found to have acted unlawfully.

106. In our view, if criteria are proposed, they should install a presumption in favour of an immediate quashing order *unless* it can be shown that such an order would result in a serious risk of injustice to third parties, and that risk would outweigh prejudice to the individual of having to wait for a remedy. This is deliberately a more restrictive test than that set out in section 102 Scotland Act. We would foresee such orders being used only in exceptional of circumstances; that the time period of the suspension would be tightly limited; and that applications to extend the deadline for compliance would only very rarely be entertained.

¹¹¹ *De Smith’s Judicial Review* (8th ed, 2018) at 18-047.



Suspended quashing orders: conclusions

107. We are concerned that the Government's proposal for suspended quashing orders is based on misguided views about how the courts operate in practice (a view which, as we have suggested, was not borne out in the IRAL Report). The Government's justifications for these orders are unconvincing and risk doing more harm than good.
108. We recommend retaining the current range of remedies, but if suspended quashing orders were to be introduced, they should be entirely discretionary. There should be no presumption of their operation, and they certainly should not be mandatory.



Question 7

Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

109. No. We do not believe that such legislation is needed, nor do we think that it will add any clarity to the law. We will resist the temptation to wade into longstanding academic debates relating to the basis of judicial review and the prospect of nullity. This is primarily because the nullity question, whilst certainly of academic interest, is of more limited practical importance.
110. However, given that the consultation document relies almost entirely on the view of four academics who criticise the doctrine of nullity as unprincipled and improper, we wish to point out that many other prominent authors have defended a conception of nullity. Defences have been mounted by a number of prominent academics and practitioners.¹¹² Although well-respected, views relied upon to buttress the proposals in the consultation are not necessarily representative of the weight of academic opinion on this matter.
111. The Government's proposals for "clarifying" the effect (or non-applicability) of nullity are based on the idea that this theory – which views unlawful administrative actions as conceptually null and void from the outset – compels judges to quash or invalidate administrative acts. Further, it is alleged that nullity acts as a barrier to some of its other proposals, and so "reining in the court's propensity to declare the exercise of power null and void is required for suspended quashing orders to operate successfully."¹¹³ The same is said to apply with respect to prospective remedies.

¹¹² Paul Craig, *Administrative Law* (8th ed, 2016); Sir Clive Lewis, *Judicial Remedies in Public Law* (6th ed, 2020); Veena Srirangam Nadhamuni, "Suspending invalidity while keeping faith with nullity: an analysis of the suspension order cases and their impact on our understanding of the doctrine of nullity" [2015] PL 596.

¹¹³ Consultation at para. 72.



112. However, we question “the one-way system conveyor belt of nullity”¹¹⁴ and the idea that nullity acts as a straitjacket in the manner described in the consultation.
113. Accepting the idea that unlawful acts are void does not mean that judges lack discretion; indeed, it has been noted that “the notion that void acts are destitute of legal effect is and always has been subject to major qualifications”.¹¹⁵ Judges are not bound, as the Government seems to be suggesting, to quash or otherwise invalidate any unlawful action which comes before them on the basis of the nullity doctrine.¹¹⁶ This is a clear mischaracterisation of principle and judicial practice.
114. We do not think that nullity needs to be ‘corrected’ or ‘clarified’. Regardless of which academic view prevails, such theories have not, and do not, affect the extent of the court’s remedial discretion in practice. A given action can be considered unlawful (and therefore defective and/or void), yet courts can choose to exercise their discretion to issue only a limited remedy to the parties, or postpone such a remedy, or indeed, to decline to issue a remedy at all.¹¹⁷
115. There is no reason why this logic would not extend¹¹⁸ to the prospect of making a suspended quashing order or a prospective remedy as canvassed elsewhere in this consultation. As Nadhamuni puts it, “keeping faith with nullity is... not mutually exclusive with suspending invalidity.”¹¹⁹ The Government wants to give courts “a discretion about what remedy to award” in cases involving legality as well as “all other public law grounds.”¹²⁰ However the courts already have

¹¹⁴ Consultation at para. 81.

¹¹⁵ *De Smith’s Judicial Review* (8th ed, 2018) at 4-059.

¹¹⁶ See Tom Bingham, “Should public law remedies be discretionary?” [1991] PL 64 and Jack Beatson, “The Discretionary Nature of Public Remedies” (1991) 1 *New Zealand Recent Law Review* 81.

¹¹⁷ Christopher Forsyth, “The Rock and the Sand: Jurisdiction and Remedial Discretion” (2013) 18 *Judicial Review* 360 at 365-367; Tom Bingham, “Should public law remedies be discretionary?” [1991] PL 64 at 68; William Wade and Christopher Forsyth, *Administrative Law* (11th ed, 2014), 598-600.

¹¹⁸ Here we use the language of “extend” but as we point out in our response to the relevant questions, it is likely that courts can already issue suspended quashing orders, and they can almost certainly already issue prospective remedies.

¹¹⁹ Veena Srirangam Nadhamuni, “Suspending invalidity while keeping faith with nullity: an analysis of the suspension order cases and their impact on our understanding of the doctrine of nullity” [2015] PL 596 at 613.

¹²⁰ Consultation at para. 81.



significant remedial discretion at their disposal and whilst there are good reasons to resist the introduction of suspended quashing orders and prospective remedies, ideological adherence to the doctrine of nullity is not one of them.

116. In addition to being unnecessary to achieve the aims sought, ‘undoing’ nullity and legislating to revive the distinction between void and voidable actions risks giving rise to unfairness for parties. The bulk of our concerns are set out in relation to the specific questions posed relating to prospective remedies and suspended quashing orders. Put shortly, adherence to the doctrine of nullity ensures that the starting point when it comes to remedies is that individuals should only bear the brunt of public body decisions which are lawful. As Wade and Forsyth put it:

the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law... if courts were to undermine [this], no victim of an excess or abuse of power could be sure that the law would protect [them].¹²¹

117. Even if it is accepted that nullity is “relative rather than an absolute”¹²² in nature, and that remedial discretion allows for this principle to be departed from in certain circumstances in practice, it remains the case that the granting of (immediate, retrospective) relief rightly remains the norm, to be departed from only exceptionally. This is how it should be.

118. Further, it is particularly surprising that the Government seems to be suggesting that returning to a position in administrative law where judges distinguish between void and voidable errors would provide “clarity” in any meaningful sense. Judges and commentators have frequently remarked upon how the distinction is difficult, unsatisfying and confusing.¹²³ As the authors of *de Smith* put it:

Behind the simple dichotomy of void acts (void ab initio, invalid, without legal effect) and voidable acts (valid until held by a court to be invalid) lurk terminological and conceptual problems of excruciating complexity.¹²⁴

¹²¹ William Wade and Christopher Forsyth, *Administrative Law* (11th ed, 2014) at 596.

¹²² *Boddington v British Transport Police* [1998] UKHL 13 (Lord Slynn).

¹²³ Judges have remarked, for example, that the distinction “did so much to confuse English administrative law” (*Re Racal Communications* [1981] AC 374 at 383), employed “esoteric” distinctions (*O’Reilly v Mackman* [1983] 2 AC 237 at 278), and was based on “concepts developed in the private law of contract which are ill adapted to the field of public law” (*Hoffmann La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295 at 366).

¹²⁴ See *De Smith’s Judicial Review* (8th ed, 2018) at 4-058 and references therein.



119. Given that, as above, rowing back on nullity is unnecessary to adopt the changes proposed elsewhere, a return to a system considered almost universally to be characterised by complexity and confusion is to be avoided.
120. There are also practical considerations which have not been fully considered. For example, it is difficult to envisage what form legislative intervention would take; it is likely that any changes would need to go beyond simply 'undoing' the decision in *Ahmed (No 2)*¹²⁵ (if, indeed, the case really stands for the proposition which the Government and IRAL contend – on which see above). There may also be additional issues relating to potential limitations on 'collateral attack' of legislative provisions which need to be explored.¹²⁶
121. In sum, wading into the waters of nullity, voidness and jurisdiction should be resisted unless there are very good reasons to revisit these issues. We have not been provided with such reasons in this consultation.

¹²⁵ *Ahmed v HM Treasury (No 2)* [2010] UKSC 5.

¹²⁶ Christopher Forsyth, "The Rock and the Sand: Jurisdiction and Remedial Discretion" (2013) 18 *Judicial Review* 360 at 371.



Question 8

Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

122. In line with IRAL's recommendations against broad legislation,¹²⁷ and its caution that there would need to be 'highly cogent reasons' for taking the 'exceptional course' of legislating to limit or exclude judicial review,¹²⁸ we do not understand the Government's proposals to include the enactment of legislation excluding broad classes of public decision-making from judicial review. We would oppose anything resembling this. Instead, we understand the Government's proposals to be directed to giving effect to the limited number of ouster clauses which exclude specific forms of public decision-making from judicial review, particularly where alternative forms of redress (such as a tribunal) already exist as an alternative to judicial review and/or where the decision in issue is political in character.¹²⁹

123. We understand the Government's primary proposal to be the enactment of a legislative 'safety valve' designed to encourage the courts to give effect to ouster clauses by providing guidance on the criteria to be considered by courts when interpreting these provisions.¹³⁰ We note that the IRAL panel favoured non-legislative responses to any concerns about justiciability and gave seven compelling reasons for that conclusion.¹³¹ We agree with its recommendation to avoid a legislative response; however if the Government wishes to legislate, we believe that there may be some merit in enacting a safety valve provision so that the factors taken into account by courts when interpreting ouster clauses are clear and predictable.

¹²⁷ IRAL Report at para. 2.96.

¹²⁸ IRAL Report at para. 2.89.

¹²⁹ Consultation at para. 90.

¹³⁰ Consultation at para. 91.

¹³¹ IRAL Report at para. 3.91.



124. However, our support is conditional on the safety valve containing an appropriately balanced range of factors, particularly factors which would enable the courts to vindicate the interests of individuals at risk of suffering significant injustice without judicial intervention and recognition that, in a system of parliamentary sovereignty, it is unlikely that Parliament would intend the creation of a public body which could infinitely and indefinitely create its own jurisdiction and powers without any legal limits. We also think that a balanced safety valve such as this is less likely to face hostility from Parliament and will be more sustainable in the courts, given that there will be overt recognition of competing access to justice and rule of law considerations. A balanced safety valve would also target the provision specifically at the problems which the Government believes exists in relation to ousters – namely, the protection of high-policy political decisions and giving proper effect to alternative means of redress which have been provided for by Parliament. Therefore, the safety valve we advocate is likely to be one that addresses the competing concerns of Government, Parliament, and courts. We will address this in detail below.
125. We also flag our serious reservations that a safety valve provision, no matter its precise wording, is likely to produce intense and divisive litigation given the constitutional, rule of law, and access to justice issues at stake. Historically ouster clauses have produced such litigation, such as the decisions in *Anisminic v Foreign Compensation Commission*¹³² and *Privacy International v Investigatory Powers Tribunal*.¹³³ The Government must carefully consider whether this litigation is desirable or warranted, along with its associated costs and resource implications, given the small number of cases which in practice involve ouster clauses. It is not obvious to us that the effect of the safety valve would be worth this constitutional upheaval. If anything, it makes more sense for the Government to spend time considering how individual ouster clauses can be more sustainably drafted so they do not suffer the hostility of Parliament and the courts. We offer some suggestions about this below. This would eliminate the need for a safety valve altogether and in principle is the better option.
126. We further note that, given that the consultation does not identify the proposed drafting of the safety valve, it is impossible to take a firm position either way and

¹³² [1969] 2 AC 147.

¹³³ [2019] UKSC 22.



we reserve the right to change our position once further information becomes available. Before addressing the safety valve specifically, we make some remarks on the contentious nature of ouster clauses to remedy certain problematic comments made in the consultation.

The distinction between political and legal accountability

127. In the consultation, the Government claims that:

Ouster clauses are not a way of avoiding scrutiny. Rather, the Government considers that there are some instances where accountability through collaborative and conciliatory political means are more appropriate, as opposed to the zero-sum, adversarial means of the courts. In this regard, ouster clauses...act...as a tool for Parliament to determine areas which are better for political rather than legal accountability.¹³⁴

128. The problem with this claim is that it confuses the distinction between political and legal issues and the fact that the two normally deal with separate questions in different ways. For instance, the wisdom, cost-effectiveness, efficacy, humanity, and efficiency of a social security policy is not the same thing as the legality of an individual decision purportedly taken pursuant to a statutory framework enacting that policy or of an exercise of delegated powers given to Ministers to implement it, or the procedural fairness of an individual decision taken under that framework. In principle, the former is a political matter for parliamentarians and the latter is a legal question for the courts. That the Government is politically accountable to Parliament for its political wisdom does not remove or reduce the need for the Government to be judicially accountable for its legal correctness. The two are distinct things and should not be artificially fused together to justify the removal of either form of accountability.

129. As Lord Diplock put it in *R v Inland Revenue Commissioners ex p. National Federation of Small Businesses*:

It is not...a sufficient answer to say that judicial review of the actions of officers or departments of central Government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards

¹³⁴ Consultation at para. 86.



efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.¹³⁵

130. This distinction between political and legal accountability is one that IRAL itself regarded as a “constitutional fact” that the courts essentially adhered to:

The most obvious solution to a potential problem of judicial overreach is judicial restraint. This solution involves the courts’ reaffirming the fundamental constitutional fact that it is not for them to pronounce on the wisdom of the exercise of public power; instead, they are to perform the quite different function of determining whether the legal limits on the exercise of public power have been exceeded...We would encourage the courts constantly to keep that constitutional fact in mind.¹³⁶

131. Therefore, any consideration of ouster clauses must begin from a recognition of the difference between political and legal questions and a recognition that one form of accountability does not preclude the other. Indeed, they are complementary, with each addressing questions that the other cannot and thereby enhancing the other’s effectiveness. It is fanciful to suggest, for instance, that Parliament can address the injustices that arise in specific circumstances and in all individual cases in a way that a court can. By definition, Parliament deals in broad principles which are then put into operation in concrete cases by judges. In addition, Parliament has enough pressure on its time without increasing its workload through forcing disputes that would otherwise be resolved by courts onto the casework of parliamentarians.

132. This is not a suggestion that ouster clauses are never appropriate. However, it is a suggestion that any and all ouster clauses cannot be justified purely on the basis that Government is accountable to Parliament. Parliamentarians do not purport to resolve legal questions or to provide binding interpretations of statutes, just as courts do not purport to resolve political arguments. Each form of accountability is in principle distinct and they work in tandem to foster an environment of executive accountability. This should be the starting point, rather than a claim that political accountability removes the need for a court.

¹³⁵ [1982] AC 617.

¹³⁶ IRAL Report at para. 3.19.



The costs of ouster clauses

133. Ouster clauses are essentially a statutory requirement that the Administrative Court should not correct the errors of law made by public bodies. This has inevitable detrimental consequences for the rule of law – particularly the subjection of the executive to the law – and is one reason why ouster clauses provoke such controversy. In principle, the executive and all public bodies are subject to the law as much as any private individual. Ouster clauses undermine this accountability to the law by limiting the options for legal accountability and redress.

134. Judicial review has been described as ‘the rule of law in action,’¹³⁷ and is the systemic manifestation of the ancient principle outlined in *Entick v Carrington*,¹³⁸ that the executive must find authority for its actions in law and not merely in its own will or political preferences.¹³⁹ As Lord Templeman put it in *M v Home Office*, ‘the proposition that the executive obey the law as a matter of grace and not as a matter of necessity...would reverse the result of the Civil War.’¹⁴⁰ These fundamental British principles should not be undermined via ouster clauses without convincing and compelling justifications. As such, the controversy surrounding ouster clauses is not merely academic and is far from a petty lawyers’ obsession. The debate goes to the heart of the British ideal to be a democratic, rule of law society based on limited Government. As Lord Bingham put it in *A v Secretary of State for Home Department*:

I do not...accept the distinction...between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true...that

¹³⁷ House of Commons Political and Constitutional Reform Select Committee – Fourteenth Report: Constitutional role of the judiciary if there were a codified constitution (8 May 2014). Available at <https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/802/80207.htm>, para. 53.

¹³⁸ [1765] EWHC J98 (KB).

¹³⁹ This basic idea that Government is subject to law is older than *Entick v Carrington*. As Lord Sumption, then Justice of the Supreme Court, indicated in his speech called *Magna Carta then and now* on 9 March 2015, in England the proposition that the executive is bound by the law predates even Magna Carta in 1215 and is almost certainly over 900 years old. Available at <https://www.supremecourt.uk/docs/speech-150309.pdf>.

¹⁴⁰ [1993] UKHL 5.



Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.¹⁴¹

135. Importantly, ouster clauses also have implications for the supremacy of Parliament. If Parliament cannot be confident that the legal limits imposed in Acts of Parliament on public bodies will be insisted upon – coercively by the High Court if necessary – parliamentary sovereignty is a buzzword rather than a practical constitutional reality. As Lord Reed has summarised, the interrelationship between parliamentary supremacy, the rule of law, and judicial review:

At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them...Without [access to courts], laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.¹⁴²

136. Furthermore, there is consistent empirical evidence that judicial review has the capacity to enhance the quality of public decision-making in terms of both process and outcomes.¹⁴³ Research by Platt, Sunkin and Calvo has shown there to be statistical evidence suggesting increases in the level of challenge to local authorities are linked to improvements in the performance of local authorities as measured by official quality indicators. They found this to be because judicial review provides clarity on otherwise indeterminate legal questions, promotes values that are central to the ethos of public administration, and assists officials in resolving tensions between individual and collective justice that lie at the core

¹⁴¹ [2004] UKHL 56 at [42].

¹⁴² *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [68].

¹⁴³ Kerman Calvo, Lucinda Platt and Maurice Sunkin, 'Does judicial review influence the quality of local authority services?' (ISER Working Paper Series, December 2007). Available at <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2007-34>; Lucinda Platt, Maurice Sunkin and Kerman Calvo, "Judicial review litigation as an incentive to change in local authority public services in England and Wales" (2010) 20 *Journal of Public Administration Research and Theory* i243-i260.



of their responsibilities.¹⁴⁴ It also encourages public bodies to focus on the human rights of individuals who may be affected by public decisions, when these rights may otherwise be ignored, forgotten, or sidelined.¹⁴⁵ Therefore, eliminating the possibility of judicial review from entire classes of public decisions removes the beneficial effects of judicial review in promoting good, fair and lawful decision-making.¹⁴⁶

137. Alongside the high constitutional implications, it is worth underlining the human costs of ouster clauses. Judicial review is a remedy of last resort – that is, it may not be used where a reasonable alternative option for obtaining a remedy exists.¹⁴⁷ Therefore, an ouster clause excludes the remedy of last resort, where other previous avenues of redress have been incapable of correcting the error of law satisfactorily. In the consultation, the Government criticises the courts for hypothesising worst-case scenarios as a means of avoiding the effect of ouster clauses.¹⁴⁸ Curiously, as evidence for this claim, the consultation only names one case which was not about an ouster clause,¹⁴⁹ and beyond that only refers to two academic blogs, which are not the law.¹⁵⁰ In addition, IRAL itself made no claim that the courts had sought to undermine ouster clauses using this technique. IRAL's discussion on worst case scenarios arose only in relation to a small number of cases related to justiciability.¹⁵¹ Therefore, this aspect of the consultation requires significantly greater empirical support as, at present, there is no material empirical basis for

¹⁴⁴ Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'The Positive Effect of Judicial Review on the Quality of Local Government' (2010) 15(4) *Judicial Review* 337–342.

¹⁴⁵ Varda Bondy, Lucinda Platt and Maurice Sunkin, 'The Use and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences' (Public Law Project, University of Essex, and London School of Economics). Available at <https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Value-and-Effects-of-Judicial-Review.pdf>, p.2.

¹⁴⁶ See further PLP's evidence to IRAL, pp6–8, Available at <https://publiclawproject.org.uk/content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL-1.pdf>.

¹⁴⁷ *R (Cart) v Upper Tribunal* [2011] UKSC 28; *Kay v Lambeth London Borough Council* [2006] UKHL 10.

¹⁴⁸ Consultation at para. 90.

¹⁴⁹ *R v Secretary of State for the Home Department ex p. Bentley* [1994] QB 349.

¹⁵⁰ Contained in footnote 80 of the consultation.

¹⁵¹ IRAL Report at para. 2.21.



the claims being made.

138. In practice in the actual cases about ouster clauses, the considerations of the courts do not relate to imagined extreme worst-case scenarios, but to standard grounds of public law legality. As Lord Reid put it in *Anisminic v Foreign Compensation Commission*:

It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.¹⁵²

139. The more absolute an ouster clause is, the more likely it is that an individual will be left without an appropriate remedy for unlawful public conduct in all of these situations and where previous avenues of redress have failed to correct the error of law. Rendering errors of law such as these immune from challenge and remedy via judicial review should only be done with very strong justification.

The difficulty facing a safety valve provision

140. It is the irreducible and basic function of a court to determine the meaning and effects of statutory language. This includes the meaning and effects of the statutory language that constitute an ouster clause. For this reason, it is highly unlikely that a safety valve provision would end once and for all the debate between courts, the executive, and Parliament on the effect and limits of ouster clauses. While they may not have been called 'ouster clauses' in terms, similar statutory provisions existed well before *Anisminic* and were the subject of judicial decisions throughout the twentieth century.¹⁵³ A safety valve provision is likely to be another step on the ouster clause road, not the end of the

¹⁵² [1969] 2 AC 147.

¹⁵³ *R v Minister of Health ex p. Yaffe* [1931] AC 494; *R v Minister of Health ex p. Davis* [1929] 1 KB 619.



road in any absolute sense.

141. As IRAL itself noted: ‘A statutory formulation of judicial review will be interpreted as operating in the framework of the common law.’¹⁵⁴ Therefore, the words of any safety valve will still need to be interpreted in light of the constitutional issues at stake, including executive accountability, the rule of law, access to justice, and parliamentary sovereignty. In this context, it is inevitable that a safety valve provision would be given a narrow and strict reading so as to protect the constitutional fundamentals outlined above. As IRAL added: ‘[s]tatutory (or regulatory) abrogation of judicial review can only be excluded by the most clear and explicit words and will not be implied.’¹⁵⁵ IRAL provided an interesting illustration of this when the panel considered the effect of a potential ouster clause which sought to exclude “purported” decisions from being judicially reviewed:

The question of what amounts to a “purported exercise” of the prerogative of mercy would be for the courts to decide and as a result they would still enjoy substantial discretion to set aside what was intended to be an exercise of the prerogative of mercy on the basis that it did not even amount to a purported exercise of that power.¹⁵⁶

142. Courts cannot be prevented from interpreting, defining, and giving effect to their understanding of statutory language. That is their core function. The idea that a safety valve provision will produce the end of ouster clause history, despite over a century of ongoing debates on ouster clauses, is unrealistic. This is likely to be a next step on an ongoing interaction between courts, executive, and Parliament. The safety valve will have an effect – it is new statutory language, after all – but it cannot be assumed that the effect will be precisely as envisaged by the Government. Indeed, more likely than a solution to this supposed problem is a new round of constitutional litigation to determine the appropriate meaning and limits of the statutory language in the safety valve. This is virtually certain in light of the constitutional issues at stake outlined above. The Government must carefully consider whether this litigation is desirable and warranted given the very few cases decided about ouster clauses.

¹⁵⁴ IRAL Report at para. 1.43.

¹⁵⁵ IRAL Report at para.1.43.

¹⁵⁶ IRAL Report at para. 2.87.



Factors to be considered in the safety valve

143. Equally, if the Government does wish to proceed with the safety valve, we recognise that there might be some merit in expressly stating the factors to be considered by courts when interpreting ouster clauses, given the high constitutional principles at stake. This will make the factors more overt and potentially more predictable for all parties and for the courts themselves. In particular, we welcome the Government's recognition that in some situations it would be unjust to give effect to an ouster clause in an absolute way and that Parliament could not possibly have intended ouster clauses to cover some scenarios:

This could work in a multitude of ways, but essentially would allow the courts to not give effect to an ouster clause in certain exceptional circumstances. An example of this would be, if there had been a wholly exceptional collapse of fair procedure, the court could ask whether Parliament intended for this to be covered by the ouster. This 'denial of procedural justice' would, we propose, be a threshold far higher than the current ground of procedural impropriety.¹⁵⁷

144. In the consultation, the Government endorses the comments of Lords Sumption and Reed in *Privacy International v Investigatory Powers Tribunal*,¹⁵⁸ that it is unlikely that Parliament would intend the creation of a body which could determine its own powers and jurisdiction with no legal limits. We agree that this is a useful presumption for the safety valve. If Parliament established a tribunal to hear immigration appeals which was immune from judicial review but that tribunal then granted itself the power to hear tax appeals wholly unrelated to immigration, it would be remarkable if the Administrative Court could not intervene to insist that Parliament's intentions for that tribunal be respected. To do otherwise would render the enabling Act of Parliament and Parliament's sovereignty nugatory. This is a classic example of where an absolute ouster would undermine parliamentary sovereignty.

145. However, we believe that the factors identified in the consultation by the

¹⁵⁷ Consultation at para. 91.

¹⁵⁸ [2019] UKSC 22.



Government can usefully be built upon to provide further clarity for the courts and to include a more balanced range of factors. We believe that other relevant factors for inclusion in the safety valve could be: whether meaningful appeal rights are available as an alternative to judicial review, including: similar remedies; the availability of legal advice; the costs of the appeal, and the timescale of an appeal; whether the decision-maker has a duty to consult affected parties prior to making a decision; whether it is a ministerial act that is excluded from review or the decision of a specialist tribunal or commission; the degree of injustice caused to the individual; the degree to which giving absolute effect to the ouster might produce an autonomous 'local law' unintended by Parliament; the degree to which the act is of a political or legal nature; and the capacity of the claimant to engage with the alternative political processes and legal remedies available. We believe that consideration of these factors alongside those identified by the Government will produce a balanced safety valve that adequately recognises the competing interests while giving effect to the ouster of judicial review.

146. Indeed, a safety valve identifying this balanced range of factors will likely be treated with less scepticism by Parliament and by the courts in particular. The Joint Committee on the Fixed-Term Parliaments Act on the Fixed-Term Parliaments Act 2011 (Repeal) Bill made this point expressly in relation to the ouster clause in that Bill.¹⁵⁹ A more balanced safety valve would likely have a more sustainable legal effect because the clause already deals directly with constitutional concerns and will thus be respected by the courts.
147. There is an analogy to be made here with partial ouster clauses, such as time limitation provisions, which are not approached with the same degree of scepticism as absolute ousters by the courts. While partial ousters do limit access to judicial review, they do so in a targeted and balanced way. Similarly, if there is express recognition and consideration of competing considerations in the safety valve in the way that we advocate, it is likely to be met with less hostility and, therefore, be more robust when litigated in the courts. This may be a more strategic way of accomplishing the objective of this proposal while avoiding accusations of undermining fairness for individuals. It would also target the safety valve far more specifically towards the actual issues that the

¹⁵⁹ Joint Committee on the Fixed-Term Parliaments Act (Report, Session 2019–21). Available at <https://committees.parliament.uk/publications/5190/documents/52402/default/>.



Government has identified – namely, the protection of political decision-making and giving effect to alternatives to judicial review provided for by Parliament – given that these objectives are expressly identified on the face of the safety valve.

A stronger role for Parliament

148. Given the Government's insistence on the importance of Parliamentary sovereignty, it is a surprise that the consultation makes no recommendations to improve Parliament's scrutiny of ouster clauses. We believe that Parliament plays an important – indeed, the primary – role in holding Government to account for its legislative activities and we wish to see Parliament's role in scrutinising ouster clauses respected, strengthened, and extended. If the Government believes in the virtue of political accountability, it must expressly recognise that in the context of ouster clauses.
149. There are a number of specialist committees across the two Houses that may be interested in ouster clauses, including the House of Lords Constitution Committee, the House of Commons Justice Committee, the Delegated Powers and Regulatory Reform Committee, the House of Commons Home Affairs Committee, the Joint Committee on Human Rights, and the Public Administration and Constitutional Affairs Committee. Where appropriate, the two Houses have also created a range of sub-committees to deal with highly specific matters, such as the Fixed-Term Parliaments Act Committee. We believe that the constitutional significance of ouster clauses merits the creation of a new joint committee or sub-committee related specifically to ouster clauses, constituted by a number of MPs and peers sitting on the previously named committees, which should meet on an ad hoc basis when the Government proposes a new ouster clause.
150. On the creation of this committee, there should be an obligation, perhaps in the standing orders of both Houses, that the committee should be notified of ouster clauses contained in Bills spearheaded by the Government. This committee should then examine proposed ouster clauses and produce a report on the implications and merits of that ouster clause, possibly with time made available for the report to be debated on the floor of each House. The Government should also have an obligation, perhaps in standing orders or at least a political duty, to produce in writing a considered response to that report. In



addition, there might be a statutory obligation on the courts as part of the safety valve to have regard to the report of the ouster clause committee and the Government's written response. This will provide the court with a direct perspective on the issues at stake and the Government's answers to the constitutional concerns. If the new committee agrees with the merits and breadth of the ouster clause and the court considers that report as part of the safety valve, it would be highly unlikely that the courts would disagree with the assessment of such a high-level and specialist committee.

151. We also believe that there is a strong case for a duty in legislation requiring post-legislative scrutiny of ouster clauses. This could take the form of a requirement on the relevant department to gather relevant data, hold consultations with affected and interested parties, and produce a report annually on the effect of the ouster clause so that Parliament is kept informed of the consequences of its legislative choices.



Question 9

Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

152. We favour the proposal to remove the promptitude requirement providing that Courts maintain their existing discretion to extend limits.
153. A judicial review claim form must be filed “promptly; and in any event not later than 3 months after the grounds to make the claim first arose.”¹⁶⁰ As the IRAL Report acknowledges,¹⁶¹ specific time limits apply to procurement challenges, *Cart* judicial reviews and in relation to public inquiries.
154. The requirement for promptitude can cause uncertainty,¹⁶² particularly for claimants and their representatives, who are put under pressure to progress cases quickly at an early stage. This may not always be sensible or in the interests of justice when there are good reasons for delay; for example, to engage in pre-action discussions with the proposed Defendant, or to await the outcome of a Legal Aid Agency funding application.¹⁶³ Removing the requirement for promptitude may help to lessen these pressures and is likely to benefit the public interest, as claimants may be more willing to engage in pre-action negotiations. However, we anticipate that in most cases practitioners will still do all that they can to act promptly, because it will be in their client’s interests to do so. In most cases, the three-month deadline alone necessitates acting quickly.
155. In Northern Ireland, the promptitude requirement for judicial reviews was

¹⁶⁰ CPR 54.5(1).

¹⁶¹ IRAL Report at para. 4.134.

¹⁶² Such that doubt has been expressed about whether it is sufficiently certain to comply with EU law: see *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23 and Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* (2010) PTSR 1377.

¹⁶³ Current legal aid processing times for applications is 10 working days (2 weeks) but some applications can take up to a month to be determined.



disapplied in 2018.¹⁶⁴ We understand that the experience in that jurisdiction has been that removing the requirement has, in practice, had little impact and claimant solicitors still act promptly even though they are not required to do so.¹⁶⁵ Anecdotally, the reasons that have been suggested for this are: first, even if promptness is not an express requirement, there are opportunities for the courts to consider promptness implicitly, especially at the permission and remedial stage; and, second, lawyers don't wish to be publicly criticised by defendants or courts for not acting promptly, so will do so even without a legal obligation. Another suggestion was that the removal of the promptitude requirement made claimant solicitors more willing to put time and effort into the pre-action letter because they know they have a deadline of 3 months rather than a vaguer "promptness" standard to work towards.

156. For the avoidance of doubt, we would be against any proposal to introduce a 'hard' 3-month deadline, with no or limited scope for extension. We note that Question 9 of the Government Consultation states (our emphasis): "The result will be that claims *must be* brought within three months." At the moment the Court has the power to extend time limits (CPR 3.1(2)(a)) and will do so if there are good reasons. In our experience, that discretion is exercised by the Court in a fair and reasonable way, taking into account the particular circumstances of the case. We would oppose any attempt to reduce the Court's flexibility in this area. A 'hard' 3-month deadline may have this effect, even if unintended.
157. On balance, we are in favour of inviting the CPRC to remove the promptitude requirement, but only on the condition that the Court retains the flexibility to extend the time limits if there is a good reason.

¹⁶⁴ By the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017.

¹⁶⁵ From Public Law Project's informal discussions with legal practitioners and academics working in Northern Ireland.



Question 10

Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

158. We agree with the IRAL Panel that it has been difficult to identify any aspects of the law in respect of time limits which are open to being clearly improved. We are unconvinced that there is a need to extend the time limit or that this would have the desired effect of encouraging pre-action resolution. However, we have no objection to the CPRC being invited to give this further consideration.
159. The current system whereby claims must be issued within 3 months, but with the court having the power to extend time limits in certain circumstances, reflects the correct balance of flexibility and certainty. Determining whether an extension is granted should be left to the court's discretion and it is important that flexibility is not lost in favour of rigid and prescribed time limits.
160. We would question whether extending the time limit beyond 3 months would have the desired effect of increasing engagement in alternative dispute resolution. In the current system, formal ADR plays a fairly limited role.¹⁶⁶ Public law disputes do not lend themselves readily to ADR.¹⁶⁷ As the Hon Sir Michael Fordham QC has stated:

...compromise may be difficult: the nature of public authority functions and

¹⁶⁶ Michael Fordham QC, *Judicial Review Handbook* (7th ed, 2021) at para. 10.2 and Varda Bondy et al, *Mediation and Judicial Review: an empirical research study* (Public Law Project, 2009).

¹⁶⁷ The special status and function of public law was recognised in the 2001 Government pledge to use ADR to resolve disputes involving Government departments wherever possible. The pledge specifically excluded public law and human rights disputes. The exclusion reflected Lord Irvine's view that, while ADR has an expanding role within the civil justice system, "there are serious and searching questions" to be answered about its use and that it was "naïve" to assert that all disputes are suitable for ADR and mediation. Examples cited by Lord Irvine included cases concerning the establishment of legal precedent, administrative law problems, and cases which "set the rights of the individual against those of the state." These, he said, must be approached with great care, see: Rt Hon Lord Irvine of Lairg, *Inaugural Lecture of the Faculty of Mediation and ADR* (27th January 1999).



responsibilities can mean a position come to be maintained, unless and until a court rules against its lawfulness.¹⁶⁸

161. This reflects our experience as practitioners: we are not aware of formal ADR being used extensively prior to issuing proceedings, despite PLP routinely suggesting its use in pre-action correspondence in line with the judicial review pre-action protocol.
162. We are concerned that if the CPRC takes the significant step of extending the time limit beyond 3 months (which would be done in the expectation that it will encourage parties to engage in ADR), ADR's role within the pre-action protocol will be significantly elevated. This is problematic because although consideration of ADR and pre-action negotiations are important, we are concerned that too much emphasis will be placed on the parties to engage in ADR despite it often being inappropriate or not useful.
163. We recognise however that the current 3-month limit time is short in comparison with other types of litigation. It is not uncommon for potential claimants to become aware of a decision some time after it has been taken. Furthermore, potential claimants, particularly those who may be vulnerable or unfamiliar with the UK's legal system, often do not seek legal advice until some time after the decision has been made. Particularly in some areas of legal aid work, potential claimants do not self-refer for legal advice, but are referred to solicitors by NGOs; this extra step builds in additional delay which can make meeting the 3-month deadline difficult. Furthermore, legal aid applications can cause further delay to a claim being issued. We also recognise that defendants may struggle to comply with their duty of candour prior to the expiry of the 3-month time limit (particularly if pre-action correspondence is sent close to the deadline), thereby leaving the claimant to weigh up whether to issue proceedings before a full assessment of the merits of the case can be undertaken.
164. We believe however that the current system allows for such issues to be dealt with: in very urgent cases the pre-action protocol can be dispensed with; a claim can be issued protectively, stayed and then negotiations entered into; or a claim can be filed late together with an application to extend time.
165. In our experience, judicial review claims can often settle pre-action and the pre-

¹⁶⁸ Michael Fordham QC, *Judicial Review Handbook* (7th ed, 2021) at para 10.2.



action protocol provides an effective framework for pre-action negotiations.¹⁶⁹ The effectiveness of the pre-action protocol in assisting parties to arrive at settlement prior to litigation could be further improved through fairly remunerating practitioners for pre-permission work under the legal aid scheme. Pre-action work is not adequately remunerated with the 'legal help' funding available.¹⁷⁰ This is further exacerbated by the "no payment without permission" legal aid rules introduced in 2013.¹⁷¹ In combination, the poor remuneration for pre-action work and the significant risk that practitioners take that all work between issue and permission will not be remunerated at all, may be pulling away from focusing parties on settlement at early stages. Extending time limits for pre-action work without improving legal aid remuneration is not likely to improve pre-action resolution. Improved remuneration for all work undertaken pre-permission and thereby incentivising early settlement should be the policy aim here.

Alternatives

166. An alternative to extending the time limit, may be for time to start running once the claimant is notified, or becomes aware of, the decision they wish to challenge (rather than the date the grounds first arose). Alternatively, there could be a presumption that the court will grant an application to extend time in certain circumstances. A further option may be to allow the parties to apply jointly to the court for an order extending the time limit to a certain date – the benefit of this approach is that it retains certainty and judicial control, but also allows for greater flexibility than in the current system.

¹⁶⁹ This lines up with the empirical literature: see e.g. Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review* (Public Law Project, 2015) and Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review* (Public Law Project, 2015).

¹⁷⁰ In public law matters, a fixed fee of £259 is payable for pre-issue advice under the Legal Help scheme, with hourly rates of £52.65 (in London)/£48.24 (outside London) payable only if in excess of £777 worth of work is done: Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422, as amended.

¹⁷¹ Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422, as amended.



Conclusion

167. Overall, we do not object to the CPRC being invited to consider extending the time limit to encourage pre-action resolution.



Question 11

Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

168. CPR 54.5(2) states that the judicial review time limits “may not be extended by agreement between the parties.”
169. We are in favour of the CPRC being asked to consider this proposal, which could encourage early settlement in certain cases. However, we do have concerns about, firstly, the risk of prejudice to litigants in person, and secondly, the potential for persistent delay if parties feel under pressure to agree to time extensions but are unwilling to engage in pre-action negotiations in practice. If the CPRC are invited to consider this proposal we would be grateful for the opportunity to provide further input before any changes are introduced.
170. As the IRAL Report noted, allowing parties to agree an extension of time for filing a claim was recommended by Michael Fordham QC and others in a 2014 report published by the Bingham Centre for the Rule of Law.¹⁷² The authors noted that first, parties already informally agree ‘not to take a time point’ and that this gives rise to uncertainty for claimants because there is no guarantee that the Court will uphold this arrangement and permit the claim to proceed out of time. Second, the strictness of the current rules mean that claimants are forced to issue proceedings protectively and that this can result in unnecessary costs to both sides.
171. We have experience of both scenarios in our own casework. If a claim is issued

¹⁷² Michael Fordham QC et al, “Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre for the Rule of Law, February 2014) available at https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistent_with_the_rule_of_law.pdf.



protectively then immediately stayed, only for it to be settled prior to permission stage, this results in costs being incurred which, even if the case is resolved in the claimant's favour, will not be necessarily recovered from the defendant. Being able to extend the time limit by agreement could avoid this outcome and result in resolution at pre-action stage. In claims that are of unclear merits it would reduce the need to issue prematurely, and allow the solicitor to carry out further investigation into a claim where, for example, the client has not approached a solicitor until close to the deadline¹⁷³ or further disclosure is needed from the Defendant public body.¹⁷⁴

172. On the other hand, we note that the time pressure of limitation can actually be helpful in encouraging parties to settle. Sometimes it will not be until the claim is issued that a defendant engages substantively with the claimant's arguments. It is often not until this stage that a public body seeks advice from counsel. The utility of extending time by agreement will largely depend on the extent to which public bodies engage with the legal issues at the pre-action stage. Extending the time limit may give rise to unnecessary delay that will prejudice the claimant and, as the IRAL Report notes, third parties.
173. The IRAL Report states¹⁷⁵ that "[w]hile we were also attracted to this suggestion [to allow parties to agree to extend time limits], we think that it may be very difficult to implement without creating undesirable side effects for third parties, including other Government agencies." We agree there is a public interest in third parties being able to rely on the validity of Government decisions and knowing relatively quickly after a decision is made whether it is going to be challenged. In the planning context there will be a potentially large number of people impacted by a challenge who will not be aware that a judicial review has been brought, or that time has been extended. An adverse impact on third parties may occur in cases where guidance or legislation under challenge is being relied on or

¹⁷³ This may be due to lack of awareness about the decision; lack of knowledge about the 3-month deadline; time spent exhausting other remedies beforehand; or lack of access to public law legal aid solicitors, which is a particular problem in certain parts of the country known as 'advice deserts'.

¹⁷⁴ Being able to extend time may help the Defendant comply with their duty of candour. Sometime the Defendant will struggle to identify, gather, sort and disclose all relevant materials requested in a PAP within 14 days. In these circumstances, allowing parties to extend time would help both parties assess merits of respective cases before issue.

¹⁷⁵ IRAL Report at paragraph 4.144.



implemented by other bodies such as local authorities.

174. We also have concerns about how this proposal would work in cases where the claimant is a litigant in person. The claimant may feel pressured to agree to repeated extensions of time without understanding the risk that such delays could have for their case. As in all forms of ADR, there is an imbalance of knowledge and power between represented and unrepresented parties which are likely to taint such negotiations.¹⁷⁶
175. We note that in general civil litigation, ‘standstill agreements’ can be entered into by the parties to suspend or extend the limitation periods¹⁷⁷. These do not generally require oversight of the Court. Something similar could be permitted in judicial review cases or, in the alternative, the Court could be required to approve agreed consent orders to extend time. This should achieve flexibility but ensure the court retains oversight, which may help to guard against persistent extensions where little progress is being made towards settlement.

¹⁷⁶ See Varda Bondy and Margaret Doyle, *Mediation in Judicial Review: A practical handbook for lawyers* (Public Law Project 2011) at p.19; Maurice Sunkin and Varda Bondy, “Settlement in Judicial Review Proceedings” [2009] PL 237 at 239–240.

¹⁷⁷ Although we note that the validity of standstill agreements was the subject of some uncertainty – see *Cowan v Foreman* [2019] EWCA Civ 1336.



Question 12

Do you think it would be useful to invite the CPRC to consider whether a ‘track’ system is viable for Judicial Review claims? What would allocation depend on?

176. PLP is not persuaded that the case for introducing a track system has been made out. Since this was not a recommendation made by IRAL and the Consultation Paper does not identify the call for evidence respondent(s) who made this proposal, it is difficult for PLP to respond effectively to the proposal since we do not know what motivated the respondent to make this suggestion in their response, and the rationale is not explained in the consultation paper. The observations below are therefore a preliminary response, based on our experience of judicial review proceedings in the Administrative Court.
177. The caseload of the Administrative Court is not large enough to warrant the introduction of a track system. It is a low-volume jurisdiction. Data at Appendix D of the IRAL Report confirm that even at its peak in 2013–2015, and even including immigration cases now dealt with by the Upper Tribunal, there were fewer than 20,000 cases each year. In recent years the number of cases issued in the Administrative Court has been closer to 4000. This is dwarfed by other jurisdictions – for example in Q2 of 2020, there were 118,000 county court money claims issued – despite a 75% reduction in volume due to the COVID-19 pandemic. In such large jurisdictions, the track system allows claims to be organised, primarily by value, in a way which ensures that proportionate resources are expended by the court and the parties. Even in such jurisdictions, however, there are cases which are managed outside the main tracks and in multi-track cases bespoke case management is often required.
178. Another feature of the Administrative Court caseload which militates against the introduction of a track system is the permission requirement, and the fact that “in all areas of judicial review only a small proportion of cases make it to a final hearing compared with the number of applications. Indeed, a significant number do not reach the permission stage or are withdrawn between being granted



permission and their substantive hearing”.¹⁷⁸

179. Introducing a track system would introduce unnecessary procedural complexity to a system which currently works well. Under the current system, standard directions can be varied on application by one or more of the parties, or by the court of its own motion, where a different timetable, or additional steps, are warranted by the complexity, urgency, or importance of the case. Similarly, the court can dispense with steps in the standard procedure or directions where this is the most effective and proportionate way of the case proceeding, for example by directing a ‘rolled up’ hearing at which permission is considered, with the final hearing of the claim to follow immediately if permission is granted.
180. Given the relatively small size of the Administrative Court caseload, and the dynamics of judicial review as outlined above, PLP does not believe that the introduction of a track system is warranted.

¹⁷⁸ IRAL Report, paragraph D21 in Appendix D.



Question 13

Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

181. The IRAL Panel commented upon an increase in the number of interventions, its concern being “that this development is the product of unfettered judicial discretion.”¹⁷⁹ It went on to recommend that criteria for interventions should be developed in guidance.
182. We note that the consultation paper itself makes no proposals in relation to interveners, which we believe is the correct approach. Intervenors provide significant assistance to the court and judicial discretion on which interventions to permit and to what extent they should be heard is key. The current system works relatively well and there is no case for reform.
183. Intervenors generally seek permission to place material before the court in the public interest, thereby assisting the court in determining a legal issue with significance beyond the narrow dispute between the parties. Organisations that intervene include public authorities and Government departments, regulatory bodies and public agencies, and charities and non-Governmental bodies with particular expertise and understanding of the issue before the court. In *E (A Child) v Chief Constable of the Royal Ulster Constabulary*, Lord Hoffmann explained that intervenors are granted permission “in the expectation that their fund of knowledge or particular point of view will enable them to provide the [court] with a more rounded picture than it would otherwise obtain.”¹⁸⁰
184. We note that paragraph 4.107 of the IRAL Report refers to “repeat-player” intervenors and a significant rise in the use of intervention. From the submissions we have seen, we cannot identify the evidence basis for the claim that there has been a rise in the use of interventions. We also note that paragraph 4.107 refers

¹⁷⁹ IRAL Report at paras. 4.101–4.108.

¹⁸⁰ [2008] UKHL 66 at [2].



to Liberty and JUSTICE as “repeat-players” without reference to Government departments, who certainly are “repeat-player” interveners themselves.

185. Whether an intervention is granted permission is entirely within the discretion of the judge. Interveners may apply for permission to appear at the hearing and make oral submissions, or might limit their application to written submissions alone. The judge can set conditions on the scope of the intervention, and may also consider any objections to the application raised by the parties or any submissions in support. Limitations can include restricting the length of submissions from interveners or directing that permission be given only for written material to be produced. This material can also be limited by the terms of the permission granted, and, for example, an intervener might be permitted to produce evidence but not empowered to make legal submissions on its relevance.

186. Interventions have proved valuable to senior judges.¹⁸¹ Speaking extra-judicially, Baroness Hale has said:

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer [...] [F]rom our – or at least my – point of view, provided they stick to the rules, interventions are enormously helpful.¹⁸²

187. As highlighted by the IRAL Panel, judges have not been slow to criticise interveners whose contribution to a case has been of limited value.¹⁸³ The Panel gave the example Lord Hoffman’s criticism of unhelpful and unnecessary intervention in the 2002 *Northern Ireland Human Rights Commission* case.¹⁸⁴ Another example is *R (Burke) v General Medical Council*.¹⁸⁵ In that case, the

¹⁸¹ In their response to an earlier consultation paper on judicial review, the senior judiciary submitted evidence saying that “the experience of the court that, not uncommonly, it benefits from hearing from third parties”: “Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’ at para. 37, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf>.

¹⁸² Baroness Hale, “Who Guards the Guardians?” (Public Law Project Conference: Judicial Review Trends and Forecasts conference, October 2013), available at <http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians>).

¹⁸³ IRAL Report at para. 4.106.

¹⁸⁴ [2002] UKHL 25.

¹⁸⁵ [2005] EWCA Civ 1003, see esp. at [82].



issues in the claim had expanded before the High Court in a broad judgment by Munby J, and those broader issues were addressed by a wide range of interveners (there were 10 in total). The Court of Appeal decided that the appeal could be determined on a limited basis, and the court indicated its regret that the case had expanded inappropriately.

188. We consider that if the IRAL recommendation for development and publication of criteria for permitting intervention were to be implemented, the criteria would only mirror the current case law and provide no overall benefit. If the published criteria are detailed and exhaustive, they are unlikely to adequately or sufficiently flexibly cover the great range of judicial review claims considered by the court. If the criteria are drafted sufficiently broadly and flexibly, it is hard to see what will be gained from having them.
189. Confusingly, question 13 is not actually addressed at interveners. Instead, it appears to fuse together interveners with those who assist litigation and seeks to 'make them visible,' the implication being that they currently are not. However, this proposal raises some more general concerns:
 - (a) We cannot see the evidence basis indicating that organisations or wider groups "that might assist in litigation" are currently not being identified, or what difficulties this is giving rise to. We cannot say categorically that there is no evidence basis as we are still waiting for adequate disclosure of the Government submissions to the IRAL call for evidence. In the absence of an apparent evidence basis or logical grounding, it is impossible to say what will be gained from this proposal and there may also be negative results.
 - (b) The conflation in this section of the consultation paper between interveners and third parties risks misleading respondents generally. It is impossible to be confident that this element of the consultation is therefore meaningful.
 - (c) Third parties who may be able to assist with litigation often cannot be usefully identified until the Defendant's Detailed Grounds of Defence have been filed and it is clear what the respective parties' positions are. Forcing parties to identify third parties at an early stage will lead to the court being swamped by litigators. This risk is real in commercial judicial reviews where the test for interveners is well-defined, but it is possible that at an early stage in proceedings there



are often many well-resourced organisations who are concerned as to the outcome and might seek to assist the court.

- (d) We are aware of proposed changes to Practice Direction 54A which significantly increases the burden on potential interveners seeking permission to intervene (by requiring that they file at the application stage any evidence sought to be relied on should permission be granted). We anticipate this reform will have a significant chilling effect on the amount of assistance provided to the court by interveners. We consider no further reforms should be made in relation to interventions or third parties whatsoever until the impact of the change to PD54A has been monitored and evaluated.



Question 14

Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

190. Yes. There is currently no formal provision for claimants to file a reply to the Summary Grounds of Resistance before permission is considered. The benefit of a reply is that it allows claimants to respond to any new points raised, and/or to correct any misapprehensions, in the Summary Grounds of Defence before permission is considered. In PLP's experience, a succinct reply can assist the permission judge and reduce the likelihood that arguable claims will wrongly be refused permission on the papers, thus reducing the number of claims that are renewed to an oral permission hearing.¹⁸⁶ This was a recommendation which PLP made in its submission to the IRAL Panel's call for evidence and we note that we were not alone. The IRAL Panel recommended this reform¹⁸⁷ and we endorse that recommendation.

¹⁸⁶ See Michael Fordham QC et al, "Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre for the Rule of Law, February 2014) available at https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistent_with_the_rule_of_law.pdf at para. 3.3.

¹⁸⁷ IRAL Report at paras. 4.150-4.153.



Question 15

Do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

191. The consultation paper lacks sufficient clarity on this issue to enable PLP to comment on what is being proposed. It is noted that this reform was not recommended by IRAL but is said to be drawn from an unidentified response to the call for evidence. The reasoning in the consultation paper at paragraph 105 relates to Summary Grounds of Resistance, not Detailed Grounds of Resistance. We do not therefore understand what change to the obligations surrounding Detailed Grounds of Resistance is being proposed and cannot comment.

192. However, it appears that paragraph 105 of the consultation paper is drawn from a section in the response to the Call for Evidence from Leigh Day. It is a partial quotation of a section of their response which set out a series of proposals for reform of the permission stage, the rationale for which was explained as follows:

The permission stage was originally intended to be a low costs filter to ensure that unmeritorious claims did not take up unnecessary time on the part of the Court and Defendants. Unfortunately, as elaborated on below, in practice (and the current Civil Procedure rules are in part to blame for this) the permission stage has become almost the main battle ground in judicial review. It often entails Defendants pouring significant resources into stopping a claim at that stage and, not infrequently, the claim is then compromised once permission is granted. If the claim is not conceded, then the filing of detailed grounds etc. amounts to needless duplication of the already extensive summary grounds and evidence filed at the permission stage.¹⁸⁸

193. PLP supports the aim of the proposals for reform of the permission stage in the Leigh Day response. However, to be effective, they would need to be implemented in full, including the proposed reform to the costs rules and discouragement of Defendants attending oral permission hearings. We agree

¹⁸⁸ Leigh Day submission to IRAL (available here: <https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/>) at p.7.



with Leigh Day that if implemented in full they would “place more emphasis on settlement and the pre-action protocol (hopefully leading to fewer claims being issued) while also speeding up the permission stage and reducing the overall costs of a judicial review (by, for instance, removing the duplication between Summary Grounds and Detailed Grounds etc.).”

194. Paragraph 105(a) of the consultation paper relates to Summary Grounds for Resistance, not Detailed Grounds for Resistance. Defendants are not obliged to submit an Acknowledgement of Service unless they wish to take part in the judicial review.¹⁸⁹ Even then, the only penalty for failing to file an Acknowledgement of Service is that the Defendant may not participate in any permission hearing. If permission is granted then, provided that the Defendant complies with CPR54.14 or any direction of the court as to the filing and service of Detailed Grounds for Defence, the Defendant can participate in the final hearing of the claim for judicial review even if it did not file an Acknowledgement of Service.
195. At paragraph 106, the consultation paper indicates that the Government supports these proposals because it “links the requirements of the Defendant (i.e. to undertake the lengthy task of writing Detailed Grounds of Resistance) to the conduct of the Claimant”. Yet paragraph 105(a) is concerned with the Summary Grounds for Resistance which are required to “set out a summary of [the Defendant’s] grounds” for contesting the claim. There is no requirement to provide anything lengthy at this stage. The function of the Summary Grounds is to identify any “knock-out blow” which should lead to permission being refused, not to respond in detail to the grounds for judicial review. Defendants are not required to draft detailed grounds before permission is granted as suggested at paragraph 106 of the consultation paper.
196. If the Pre-Action Protocol has been followed by both parties then there is nothing to prevent the Defendant from relying on its Pre-action Protocol Response in its Acknowledgement of Service. If the PAP Response sets out, as it should, the Defendant’s reasons for contesting the claim, then there is no reason for the Defendant to incur further costs of preparing separate Summary Grounds of Resistance. The Claimant would in any event ordinarily be expected to include the PAP Response in the permission bundle and, in the absence of an

¹⁸⁹ CPR 54.8.



Acknowledgement of Service or Summary Grounds of Defence, it is no doubt to this that the Court will turn to understand the Defendant's position in considering whether to grant permission.

197. Paragraph 107 is similarly difficult to follow. It is argued that it is disproportionate to require detailed grounds to be submitted if the Claimant could have provided the opportunity to respond at the pre-action stage, but the proposal at paragraph 105(a)(ii) is precisely the opposite in that it is suggested that Defendants should only be required to file Summary Grounds of Resistance if the Claimant raises new grounds which were not raised at the pre-action stage. In the context of the proposed streamlining of the permission stage suggested in the Leigh Day consultation response, this makes sense: the Defendant would have had the opportunity to raise any knockout blows in their PAP response and there would be nothing to be gained from submitting Summary Grounds for Resistance unless something new is raised in the Detailed Grounds of Claim as issued.
198. It is difficult to understand what the rationale would be for not requiring the Defendant to file – or why a Defendant would not want to file – Detailed Grounds for Resistance in a claim in which permission has been granted on grounds which were not raised and responded to in pre-action correspondence.
199. In the circumstances, PLP does not understand the case for changing the obligations concerning Detailed Grounds for Resistance. We are therefore unable to support the proposal.



Question 16

Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

200. No. There is no evidence that Defendants routinely require more than 35 days after permission has been granted to file Detailed Grounds of Defence and evidence. The consultation paper does not refer to any evidence in support of this proposal, it was not recommended by IRAL, and PLP is not aware of any particular difficulties faced by eDefendants (who will already have had the opportunity to consider their position when responding to the Pre-Action Protocol and again when filing an Acknowledgement of Service) in meeting the existing deadlines. It does not appear to have been sought by any of the Government departments who responded to IRAL's call for evidence (it is not mentioned in the summary of their submissions). Where this arises in individual cases, Defendants can ask the other parties to agree to an extension of time and, if such agreement is not forthcoming, apply to the court. It would only be if there were evidence that the existing time limits are routinely unachievable for Defendants that a change to the general rule would be warranted. The existing timetable for judicial review is designed to ensure that the procedure is relatively speedy given the impact on third parties and legal certainty of potentially unlawful decisions or actions not being considered promptly by the courts.
201. It was also suggested by respondents to the call for evidence that there could be greater guidance on the Pre-Action Protocol (PAP) procedure. The Government invites consultees to submit feedback and comments on (a) what issues are currently being faced in relation to the PAP; and (b) how to best clarify this. The IRAL Report concluded that the "pre-action protocol procedure is operating as a significant means of avoiding the need to make claims and for valid cases to be considered and settled by defendants, as well as identifying claims which were not arguable."¹⁹⁰ The Government considers it likely that greater clarity as to the working of the PAP could reduce the need for Judicial Review claims to be

¹⁹⁰ IRAL Report at para. 4.74; see Consultation at para. 109.



brought when they could have been resolved pre-proceedings.

202. In the absence of any indication as to what “greater clarity” is being considered here, it is not possible to address this statement and request usefully. We have identified above that improved remuneration under the legal aid scheme for pre-permission work is required. Generally, we consider that the pre-action protocol is an effective framework. There are areas where improved compliance with the protocol would assist early clarification of the issues in dispute and early settlement. For example, defendants complying with requests for pre-action disclosure or responding substantively to pre-action protocol letters before claim within shortened time frames where required (i.e. shorter than 14 days). However, compliance with the protocol will not in our view be assisted by further guidance and we note judicial discretion to address non-compliance through directions and costs consequences.



Question 17

Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

203. The very limited time available for responding to this consultation has impeded our ability to make anything other than very broad points in response to this question. We reiterate the points made in the introduction to this consultation response, in our IRAL submission (and that of many other respondents), and in the IRAL Report, about the constitutional importance of judicial review and the need for any reform to proceed in a cautious, evidence-based way if it is not to have significant adverse implications for the rule of law and access to justice. These risks must be weighed up as part of any impact assessment. It will also be essential to consider the cumulative impacts of any proposals with which the Government decides to proceed, and to do so in light of any recommendations made by the Independent Review of the Human Rights Act and of the proposals in the New Plan for Immigration which relate to judicial review.
204. We have identified below in detail how equalities impacts should be considered by the Government at this juncture. Many of our observations below apply in a broader sense to a full impact assessment also and can be read across here. Generally, if the iterative approach to reform is to be adopted as claimed in the Foreword to this consultation paper, each reform must be impact assessed and, after implementation, evaluated and monitored, before the next stage of reform can be fully and adequately impact assessed. For example, the serious danger of the Government's current approach to constitutional reform across a number of bodies (the Ministry of Justice, the Home Office and the CPRC) means that each set of proposals cannot be adequately impact assessed unless considered holistically and carefully monitored and evaluated.



Question 18

Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

205. The Government consultation puts forward a range of proposals all of which could be implemented in a multitude of ways. This, along with the short time frame we have for responding to the consultation, makes it impossible to analyse the equalities impacts in any detail. Another significant barrier is the lack of official data in this area. The Ministry of Justice does not collect data on the protected characteristics of claimants in judicial reviews. We have therefore only been able to make high-level observations about equalities considerations. It is well established that the Public Sector Equality Duty requires public bodies to collect the information needed to analyse equalities impacts of their policies.¹⁹¹ We support the submission from Equally Ours, which puts forward the types of information that the Government will need to collect and analyse in order to be able to assess the equalities impacts of these proposals. Data on the protected characteristics of Administrative Court and tribunal users should be obtained by the Ministry of Justice, particularly in relation to *Cart* judicial review cases, in order to inform an Equality Impact Assessment of the proposals.
206. Our starting point is that the Government proposals, taken in their entirety, are likely to dissuade claimants from bringing judicial review cases. The removal of *Cart* judicial review cases is of course intended to have this effect. The proposals for suspensory prospective remedies would be likely to have this effect, because claimants would be put off bringing claims due to the prospect of being denied an effective remedy in their case. The increase costs of bringing a case (due to

¹⁹¹ *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26]; Equality and Human Rights Commission, *Technical guidance on the public sector equality duty: England*, Chapter 5, available at <https://www.equalityhumanrights.com/en/publication-download/technical-guidance-public-sector-equality-duty-england>.



risk of satellite litigation) would also serve to dissuade claimants.

207. Judicial review is a vital method for enforcing non-discrimination duties imposed by the Equality Act 2010, the Human Rights Act 1998, retained EU law as well as statute and common law. We agree with Equally Ours' submission which states that the weakening of judicial review as an enforcement tool will “have a negative impact on equality across all protected characteristics” and will “allow... discriminatory and unlawful policies to remain in place.”

Equalities impacts of removing *Cart* judicial reviews

208. A *Cart* judicial review is a challenge to an Upper Tribunal's refusal of permission to appeal a decision of a First-Tier Tribunal. *Cart* judicial review cases are most commonly challenges to decisions of the Upper Tribunal Immigration and Asylum Chamber (UTIAC) and they also encompass challenges to decisions of other chambers of the Upper Tribunal. Contrary to what the IRAL Panel and Government suggest, it is not known how many *Cart* judicial review cases get permission or are successful each year.
209. *Cart* judicial review cases in the UTIAC will almost all be asylum cases or immigration human rights appeals. We therefore assume that the proposals to remove *Cart* judicial review cases will have a disproportionately negative impact on people of certain ethnic backgrounds and on nationalities that are overrepresented in the immigration and asylum system.¹⁹² Asylum seekers may be fleeing persecution based on religion or belief, or on sexuality or gender identity. It is likely that the proposal negatively impacting asylum seekers will negatively impact groups based on those protected characteristics. We also expect that men would be disproportionately impacted as the majority of asylum seekers are men. A significant proportion of asylum seekers are children or young people who would also be likely to be disproportionately negatively impacted.¹⁹³ Many asylum seekers are also survivors of torture and may be disabled as a result

¹⁹² According to UNHCR website quoting Home Office statistics, the top countries of nationality for asylum applications (from main applicants) were: Iran (4318), Albania (2820), Iraq (2618) and Eritrea (2241). See: <https://www.unhcr.org/uk/asylum-in-the-uk.html>.

¹⁹³ According to Home Office statistics on asylum applicants, 23% of main applicants were aged 25 to 29 and 10% were children: see <https://www.gov.uk/Government/statistics/immigration-statistics-year-ending-june-2018/how-many-people-do-we-grant-asylum-or-protection-to>.



of the physical or mental health impacts of torture. We would expect that asylum seekers with mental health problems will find it harder to engage with the Tribunal procedures and may be disproportionately represented among those who benefit from *Cart* judicial review cases.

210. The UTAAC deals with appeals including social security, child support, mental health, and special educational needs. We expect disabled people are be disproportionately impacted by the removal of *Cart* judicial review cases of UTAAC decisions. It is also likely that women will be disproportionately impacted because they are more likely than men to require welfare benefits (as lower earners) and child support (women are more likely to have child caring responsibilities and make up 90% of lone parents).¹⁹⁴

Equalities impacts of the proposals more generally

211. As noted above, the proposals taken as a whole are likely to deter claimants from bringing judicial review claims. The proposals on remedies will put off individuals from bringing challenges because of an increased risk that they cannot obtain a remedy in their own case. Increasing the use of ouster clauses could also impede access to justice. The potential for satellite litigation will make judicial review even more expensive, which will mean those of low means will be deterred from bringing challenges even more than they are already.
212. Public Law Project represent clients from marginalised and disadvantaged groups. Judicial review is a vital tool for these groups who are disproportionately likely to experience unlawful state decision-making. Many if not most of cases brought by PLP on behalf of our clients include discrimination grounds.
213. The Government statistics show that most judicial review cases are immigration or asylum cases brought against the Home Office. Particular ethnicities, nationalities and religious backgrounds are likely to overrepresented amongst migrants and asylum seekers. A significant proportion of asylum applicants are children or young people.
214. The second highest numbers of judicial review claims are against the Ministry of

¹⁹⁴ According to Gingerbread, quoting ONS statistics: <https://www.gingerbread.org.uk/what-we-do/media-centre/single-parents-facts-figures/>.



Justice, and many of these claims are brought by prisoners.¹⁹⁵ According to Ministry of Justice statistics, minority ethnic groups and black people in particular are over-represented in the prison system.¹⁹⁶ Men are also overrepresented. High incidents of self-harm and suicide in prisons suggests prevalence of mental illness is high amongst this group.¹⁹⁷

215. After planning challenges against the Planning Inspectorate and the Ministry of Housing, Communities and Local Government, the department that receives the fourth highest number of judicial review claims is the DWP. Based on their overrepresentation in the social security system we expect that a disproportionately high number of claimants in judicial reviews cases against the DWP are women and disabled people.
216. We expect a considerable number of judicial reviews against local authorities to concern housing matters, benefits, community care, and special educational needs. A considerable number of these claims are likely to be brought by disabled people, children, and older people.
217. Our conclusion is that the Government's proposals are likely to have indirectly discriminatory effects across a number of protected characteristics including (at least) age, disability, race, religion or belief and sex. It is imperative that the Government collects and publishes data that allows the impact of judicial review reform to be properly understood and assessed before any changes are pursued. It is also imperative that the Government undertakes a cumulative impact assessment of all the proposed reforms to judicial review, including those being considered in other consultations such as the New Plan for Immigration and the Independent Human Rights Act Review.

¹⁹⁵ See IRAL Report at para. 18 and the statistics on p.67.

¹⁹⁶ Ministry of Justice, Statistics on Race and the Criminal Justice System 2018 at p.2, available at https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf.

¹⁹⁷ See Prison Reform Trust statistics which show that self-inflicted deaths are 8.6 times more likely in prison than in the general population: <http://www.prisonreformtrust.org.uk/WhatWeDo/Projectsresearch/Mentalhealth>.



Question 19

Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

218. The above detailed submission contains, as far as we are able to in response to the proposals contained within the consultation paper and in the time available, the approach the Government should consider. We have directly addressed the concerns identified by the consultation and demonstrated how they are already satisfactorily resolved by current arrangements and, where they are not, we show how the Government's proposals can be made more proportionate and sustainable while still accomplishing the underlying objectives. We do not consider that mitigation to the shift of power that these proposals contain is the correct approach. An evidence-based and holistic approach is required to constitutional reform of this nature, where reform is seen as part of a wider picture, adequately monitored and evaluated before further reform is considered.

Appendix

| Parties | | Court | Date of judgment | Outcome | HRA case? |
|---|--|-----------------|------------------|---|-----------|
| Claimant | Defendant | | | | |
| Connor | Secretary of State for Work and Pensions | High Court | 24-Jul-20 | Declaration that provision breaches rights | Yes |
| TD and Others | Secretary of State for Work and Pensions | Court of Appeal | 23-Apr-20 | Declaration that rights of applicant violated | Yes |
| OA | Secretary of State for Education | High Court | 13-Feb-20 | Declaration that rights of applicant violated and individual decision quashed | Yes |
| TP | Secretary of State for Work and Pensions | Court of Appeal | 29-Jan-20 | Quashing order and Declaration upheld | Yes |
| | | High Court | 03-May-19 | Regulations quashed | Yes |
| | | High Court | 14-Jun-18 | Declaration that provision breaches rights | Yes |
| British Medical Association | Secretary of State for Health | High Court | 17-Jan-20 | Regulations quashed | Yes |
| British Blind and Shutter Association | Secretary of State for Housing, Communities and Local Government | High Court | 21-Nov-19 | Regulations quashed | No |
| Langford | Ministry of Defence | Court of Appeal | 17-Jul-19 | Ambiguous against rejection of claim allowed. No wider effect of judgment. | Yes |
| Rachael Andrews | Minister for Cabinet Office | High Court | 03-May-19 | Regulations quashed | No |
| P | Secretary of State for the Home Department | Supreme Court | 30-Jan-19 | Declaration that provision is unlawful (narrower scope than lower courts) | Yes |
| P, W and G | Secretary of State for the Home Department | Court of Appeal | 03-May-17 | Declaration that provision breaches rights | Yes |
| P | Secretary of State for Justice | High Court | 22-Jan-16 | Declaration that provision breaches rights | Yes |
| G | Chief Constable of Surrey | High Court | 19-Feb-16 | Declaration that provision breaches rights and that it "requires amendment" | Yes |
| Elmes* | Essex County Council | High Court | 31-Jul-18 | Declaration that provision breaches rights and "must be disapplied" alongside individual remedy | Yes |
| SC | Secretary of State for Work and Pensions | High Court | 20-Apr-18 | Declaration that provision is unlawful and individual decision quashed | Yes |
| DSD | Secretary of State for Justice | High Court | 28-Mar-18 | Declaration that provision is unlawful and individual decision quashed | Yes |
| QSA | Secretary of State for the Home Department | High Court | 02-Mar-18 | Declaration that provision breaches rights | Yes |
| RF | Secretary of State for Work and Pensions | High Court | 21-Dec-17 | Regulations quashed | Yes |
| Unison | Lord Chancellor | Supreme Court | 26-Jul-17 | Regulations quashed | No |
| DA | Secretary of State for Work and Pensions | High Court | 22-Jun-17 | Unclear | No |
| Howard League for Penal Reform | Lord Chancellor | Court of Appeal | 10-Apr-17 | Unclear | No |
| TN | Secretary of State for the Home Department | High Court | 20-Jan-17 | Declaration that rules are unlawful | No |
| Carmichael | Secretary of State for Work and Pensions | Supreme Court | 09-Nov-16 | Declaration that rights of applicant violated | Yes |
| A and Rutherford | | Court of Appeal | 27-Jan-16 | | Yes |
| Public Law Project | Lord Chancellor | Supreme Court | 13-Jul-16 | Declaration that draft order is unlawful | No |
| | | High Court | 15-Jul-14 | | No |
| Rights of Women | Lord Chancellor | Court of Appeal | 18-Feb-16 | Declaration that provision is unlawful | No |
| Hurley | Secretary of State for Work and Pensions | High Court | 26-Nov-15 | Declaration that rights of applicant violated | Yes |
| Tigere | Secretary of State for Business, Energy And Industrial Strategy | Supreme Court | 29-Jul-15 | Declaration that rights of applicant violated | Yes |
| | | High Court | 17-Jul-14 | Unclear | Yes |
| Lord Chancellor | Detention Action | Court of Appeal | 29-Jul-15 | Quashing order upheld | No |
| | | High Court | 12-Jun-15 | Regulations quashed and declaration that regulations are unlawful | No |
| Davis* | Secretary of State for the Home Department | High Court | 17-Jul-15 | Declaration that s.1 DRIPA is incompatible with EU law and disapplication on that ground. Results in disapplication of regulations made under that provision. | No |
| British Academy of Songwriters, Composers and Authors | Secretary of State for Business, Innovation and Skills | High Court | 19-Jun-15 | Regulations quashed prospectively | Yes |
| Cushnie | Secretary of State for Health | High Court | 05-Nov-14 | Unclear | No |
| T | Chief Constable of Greater Manchester | Supreme Court | 18-Jun-14 | No remedy | Yes |



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