



Public Law Project

Judicial Review and Courts Bill – Second Reading – Clause 1

On Monday 18 October, MPs will debate the Judicial Review and Courts Bill which will introduce changes to the remedies available in judicial review.

Director of the Public Law Project, Jo Hickman, said:

“This Bill will make this and future governments less accountable for their actions and make it harder for people to defend their rights when the state steps out of line.”

1. What will this Bill do?

This Bill creates a presumption that a judge issuing a quashing order should make it ‘suspended’ or ‘prospective only’.

- A suspended quashing order allows an action by the public authority – which the court has said was unlawful - to continue to be treated as lawful until sometime in the future.
- A prospective-only quashing order means that the unlawful action by the public authority is only treated as unlawful from the point of the court order.

2. A harmful fiction

Jo Hickman said: “Introducing a presumption on the use of prospective only remedies means asking the judiciary to implement a harmful fiction: that unlawful state actions should be *treated* as lawful. It is like accepting that you’ve done something wrong and then saying ‘Yes, but for this period of time, we must all pretend it was ok’.

“This will cause further injustice to people who have been treated unlawfully. A judge may feel obliged to order that a prospective only remedy is adequate for the individual in front of the court, even when that would do nothing to help others also affected by the same unlawful action.

“This Government is asking Parliament for a get out of jail free card. That is not right. If you do something wrong, you should acknowledge the consequences.

3. Restricting judges and making judgments political

“The courts already have the power to use suspended quashing orders. The problem lies in creating a presumption that judges should use them. The Government says the Bill gives judges more options on remedies, but in fact it ties their hands.

“Placing the onus on the judiciary to let governments off the hook risks pushing judges into the realm of politics, something the Government says it wants to avoid.

4. Unaccountable government

“Judicial review is a last resort for people who have been wronged by the state. When hospitals and care homes are unlawfully closed, when policies discriminate against service personnel, and when disabled children are denied proper care, judicial review brings the hope of justice.

“But judicial review is already hard to access. It can only be used when all other avenues are exhausted. Legal aid is heavily restricted, and the cost risks mean that for most people it is simply unaffordable.

“Judicial review is a low volume jurisdiction. The number of cases which are lodged each year is consistently falling. Poor cases are filtered out early and parties most often settle before they even get to court. We are still wondering what problem this Bill seeks to solve.”

“The presumption on remedies throws hurdles in the way of people seeking justice. There will be an increased risk of satellite litigation, of cases taking longer, and higher costs. Judicial review will be harder to use, less fair and more expensive.

“When governments act unlawfully and the law denies people a remedy, state authorities can act without having to face the consequences of their actions. They become unaccountable.

“Parliament must not let that happen.”

5. What are quashing orders and why are they important?

When the Court rules that a public authority has acted unlawfully, an important remedy the court can issue is a ‘quashing order’; this overturns the unlawful decision or policy or regulations and undoes any adverse consequences.

- The unlawful policy of deporting EU citizens for rough sleeping came to an end immediately, and before more EU citizens were deported.
- The unlawful decision to close a children’s cardiac surgery was quickly reversed, before many more seriously ill children had to seek urgent and critical treatment further away.
- Benefit payments unlawfully denied could be back-paid in full to everyone affected, not just the claimants.

This Bill will also undermine a person’s right to a ‘collateral challenge’. A person might not be able to argue in their defence in a magistrates or Crown Court that a regulation under which they were prosecuted was invalid. Take the example of a regulation issued by the Health Secretary during the coronavirus crisis to create an imprisonable criminal offence; if that regulation was found to be unlawful and the court granted a prospective only order, a judge would have to pretend that it had always been valid. The Independent Review of Administrative Law said that restricting such collateral challenges would leave the law in a “radically defective state”.

6. How should the Bill be amended?

- The power to make remedies prospective-only should be removed
- The ‘presumption’ should be removed from the Bill
- The power to suspended quashing orders should be limited to exceptional circumstances where it is in the interests of justice

Ends