Judicial Review and Courts Bill

PLP Briefing for House of Commons Second Reading

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

Executive Summary

2. This briefing identifies a series of issues with the Bill, addressing the procedural and access to justice issues in respect of which PLP has relevant expertise and experience. Focusing on Part 1 (Judicial Review), we analyse measures in the Bill which have the potential to preclude practical access to public law remedies. Unless altered, the Bill will negatively affect the ability of ordinary people to hold the executive to account and to safeguard their rights.

3. **Judicial Review.** We have previously responded to consultations on the proposals now contained in Part 1 of the Bill (Clauses 1 and 2), which pursue the Government's agenda for judicial review reform.[1] Whilst some of the most troubling proposals have been dropped, we continue to be concerned that these clauses will undermine how effectively the current and future governments can be held to account. Clause 1 creates a statutory presumption that remedies available in judicial review should be suspended or made prospective-only. **It should be amended to remove the presumption and make clear that remedies should only be restricted in this way in exceptional circumstances.** Clause 2 would severely restrict 'Cart' judicial review. The Government has not made the case for removing this vital safeguard against serious errors in the Tribunal system in cases of the utmost importance to the people concerned. **Clause 2 should be removed from the Bill.**

Clause 1: The risks of suspended and prospective-only remedies

4. Clause 1 of the Bill would limit the effectiveness of quashing orders, one of the remedies that can be issued by a court when it finds that a decision is unlawful. The quashing order makes that illegal decision null and void. Therefore, the order is a powerful tool which ensures that unlawful government decisions can be overturned and those who have suffered the consequences of unlawfulness can obtain real redress.

5. It is important to remember that all remedies in judicial review are discretionary. Often, the court will simply make a finding that a public body has acted unlawfully and leave it to the public body to determine what action should be taken in response to that finding. PLP's research shows that in challenges to statutory instruments, for example, this is

[1] See e.g. Public Law Project, "Submission to the Independent Review of Administrative Law", available at: https://publiclawproject.org.uk/content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf; Public Law Project, "Consultation Response: Judicial Review: Proposals for Reform" available at: https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf

most common remedy following a successful judicial review.[2] But an immediate and retrospective quashing order is an important tool for righting injustice and ensuring that the executive acts only within its legal powers.

6. In any event, there are already limitations on a court's ability to grant a quashing order. For example, s31(2A) Senior Courts Act 1981 ('SCA') requires the High Court to refuse a remedy if it appears highly likely that the outcome for the applicant would not have been substantially different if the public authority had not acted unlawfully (unless there are reasons of exceptional public interest). S31(6) SCA 1981 also allows the Court to refuse relief on grounds of undue delay "if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration." Therefore, claimants' access to these orders is already strongly regulated.

7. Clause 1 seeks to restrict these orders even further in favour of the executive. It does this by limiting the effectiveness of quashing orders by allowing their effect to be suspended or applying them only in future cases. It creates a presumption that the effect of a quashing order will be suspended or prospective-only in certain cases. Combined with the existing controls on quashing orders, these new reforms weigh the scales of justice too heavily in favour of the executive.

8. Clause 1 goes significantly further than the recommendations made by the Independent Review of Administrative Law ('IRAL') established by the Government in 2020. The IRAL panel recommended legislating for a discretion to make suspended-only quashing orders. It did not recommend legislating for prospective-only quashing orders and it recommended against a presumption of limiting the effect of a quashing order in this way.

9. Suspended quashing orders would delay the point in time at which the quashing takes place, so that an unlawful act will not be treated as unlawful until a certain fixed point in the future. Prospective-only quashing orders would invalidate an unlawful act only from the point of the court order onwards, leaving past conduct, including the conduct complained about by a claimant, untouched.

10. Further, new s29A(9) SCA 1981 (inserted by clause 1(1)) creates a presumption that these weakened quashing orders "must" be made where to do so would provide "adequate redress" (absent good reasons). Such a presumption not only also goes against the government's stated intention to "provide… flexibility"[3] for judges, but risks encouraging the use of these new orders in circumstances where it would be unjust and unfair to do so. As the Government acknowledges in its Consultation Response "*Presumptions were not recommended by the IRAL Panel and generally met with scepticism from respondents to the consultation*."[4]

[2] See the Appendix of PLP's submission to the government's consultation on judicial review reform and our response to question 5 particularly: https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf.
[3] Robert Buckland, Keynote Speech on Judicial Review, available at https://www.gov.uk/government/speeches/lord-chancellors-keynote-speech-on-judicial-review
[4] Government Response to the Judicial Review Reform Consultation, para 12(4).

11. **There are five main reasons why greater recourse to these weakened remedies, and especially any presumption in their favour, should be resisted**:

- First, it places victims of unlawful actions in an unfair position; remedies which are prospective-only may leave individuals without redress at all.

- Second, they insulate government from scrutiny and make it more difficult for decision-makers to be held to account. Prospective-only remedies would be particularly likely to have a chilling effect on individual claimants bringing judicial review claims.[5] Why would someone spend money, time and effort to challenge an unlawful decision made against them, if that decision cannot be rectified in their specific case?[6] The proposed changes risk creating a situation where unlawful actions go unopposed and individuals' ability to defend their rights against an overbearing state is undermined.

- Third, they make it more – rather than less - likely that judges will be forced to enter the political realm. The effect of a suspended or prospective-only quashing order may be to grant legal validity to an action which, on its face, contravenes an Act of Parliament. It creates a judicial fix for an unlawful government act when such an action would ordinarily be the exclusive domain of Parliament.[7] Further, when deciding whether to issue a weakened remedy, judges must consider the likely future actions of public bodies, something which judges have previously described as a job they are "ill-equipped to undertake."[8] This would be an especially regrettable and ironic consequence when the government's avowed aim is to prevent judges stepping into the political realm.[9]

- Fourth, and as senior judges have acknowledged,[10] one of the benefits of the current system of quashing orders is its simplicity. Whilst being presented as a measure which promotes certainty[11], these new remedies in fact generate significant uncertainty in terms of how they are to operate and are likely to result in expensive post-judgment satellite litigation.[12] This uncertainty, together with increase in costs, will create yet another practical barrier to individual claimants bringing judicial review claims in the first place.

- Fifth, new s.29A(5) undermines a person's right to bring a collateral challenge following an illegal public act. That subsection states that, "Where…an impugned act

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[5] a point made by Lord Nicholls in *Re Spectrum Plus* [2005] UKHL 41, [27].
[6] In addition, it might be more difficult to secure legal aid to challenge such decisions: 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).
[7] Tom Hickman blog, "Quashing Orders and the Judicial Review and Courts Act", July 2021, available at: https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act/
[8] John Howell QC sitting as Deputy High Court Judge in *R (Cooper) v Ashford Borough Council* [2016] EWHC 1525 (Admin) at [86]. See also Blake J in *R (Logan) v Havering London Borough Council* [2015] EWHC 3193 (Admin) at [59].
[9] As the Lord Chancellor said at para. [8] of the government's judicial review reform consultation: "We should strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament." https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf
[10] As Lord Nicholls put it in Re Spectrum Plus [2005] UKHL 41, "whatever its faults the retrospective application of court rulings is straightforward" ([26]).
[11] Government Response to the Judicial Review Reform Consultation, paras 74 and 83, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf
[12] PLP, *Consultation Response*, para 32.

is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect." Imagine that one of the statutory instruments issued by the Health Secretary during the coronavirus crisis which created imprisonable criminal offences was declared illegal by a court. If a court granted one of the new remedies, this subsection would make it as though that imprisonment were always legal. Therefore, a person could not argue in the magistrates or Crown Court that the statutory instrument was invalid as a defence – because this subsection requires a judge to pretend that it was valid. As IRAL noted at 3.66 of its report: 'We readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible.'[13] We agree and believe that collateral challenges should be expressly preserved in the Bill.

12. **Accordingly, PLP recommend that Clause 1(1), which inserts a new s29A into the Senior Courts Act 1981, be amended to ensure that remedies are limited in this way only in exceptional circumstances:**

- The power to make remedies prospective-only should be removed by deleting new s.29A(1)(b).
- The presumption in new s.29A(9)-(10) 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 through an amendment to new s.29A(1)(a).
- The possibility of collateral challenges should be expressly protected through a new s.29A(5A).
- Finally, if the presumption in new s29A(9) remains, the phrase "adequate redress" in s.29A(9)(b) should be amended to "effective remedy" to increase certainty, and it should be made clear that the redress or remedy must be adequate both for the claimant and for any other person affected by the impugned act.

[13] IRAL Report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

Case studies highlighting the consequences of the new remedies:

R (British Medical Association) v Secretary of State for Health and Social Care **[2020] EWHC 64 (Admin)**

The Health Secretary issued the National Health Service Pension Schemes, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019, which tried to introduce a power to suspend or withhold payments of NHS pensions where an employee had been charged with an offence. There was no right of appeal from this power and the suspension did not come to an end where the employee was acquitted or where proceedings were withdrawn.
At the time of this case, this power had never been exercised. The British Medical Association brought this case as a matter of principle – that potentially innocent medical staff could be denied a pension simply for being charged with an offence that they did not commit (para [5]). Finding the Regulations to be unlawful, the judge granted a quashing order at para. [151].
Given that this case did not relate to an actual use of the power or an actual individual who was a victim of this power, the judge might have regarded a suspended or prospective-only order as "adequate", meaning that under the Bill, the judge would have been expected to suspend the effect of the order or make it prospective only. However, in the time it took the Health Secretary to consult on, draft, and lay new Regulations, there would have been nothing to prevent ministers exercising the unlawful powers as that exercise would be valid under new s.29(A)(3)-(5) of the Bill, which makes otherwise illegal uses of power legal.

R (Adath Yisroel Burial Society and Ita Cymerman) v HM Senior Coroner for Inner North London **[2018] EWHC 969 (Admin)**

The Senior Coroner for Inner North London had a policy that deceased persons would not be prioritised for burial on religious grounds, despite some religions – such as Orthodox Judaism – requiring burial within twenty-four hours. Instead, all deceased were treated on a "first come, first served" basis. The first claimant was a charity representing the Orthodox Jewish community on burial rights and the second claimant was an Orthodox Jewish woman, who was 79 years old but who was not ill or at risk of dying in the immediate term.

In this case, there was no claimant representing a deceased against whom this policy had actually been exercised. The judge determined that the Coroner's policy was unlawful under the Human Rights Act 1998 and the Equality Act 2010. The policy was quashed.

This policy was not being applied to anyone directly in the case. Therefore, a court might have regarded it as "adequate" to require future action and amendment by the Coroner but no immediate action in the form of an instant quashing order. This would have engaged the presumption in s29A(9). However, had she died in the meantime, this policy would have been applied to Mrs Cymerman and all others in the Orthodox Jewish community under the Coroner's jurisdiction, as new s.29A(3)-(5) would make the unlawful policy valid.

These case studies provide practical illustrations of the problems arising with clause 1 of the Bill. Such consequences would be especially regrettable when the Government's own election manifesto promised to "ensure that judicial review is available to protect the rights of individuals against an overbearing state", and to secure "access to justice for ordinary people".[14] These new remedies do not uphold this promise.

[14] Conservative Party 2019 Manifesto p.48, available at https://www.conservatives.com/ourplan.

Clause 2: Proposals to oust the *Cart* jurisdiction

13. Clause 2 of the Bill seeks to oust the *Cart* jurisdiction. 'Cart' judicial reviews, by which the High Court can – in exceptional circumstances – review decisions of the Upper Tribunal refusing permission to appeal, provide a vital safeguard in cases of the utmost importance. Further, the restrictive test for permission to be granted, and special streamlined procedure followed, ensures the limited and proportionate use of judicial resource. Clause 2, which seeks to severely circumscribe this essential protection, should be removed from the Bill.

14. The proposal to oust the provision was first made by the IRAL panel. It made that recommendation on the basis of its analysis that only 0.22% of *Cart* judicial review applications succeed. PLP and others pointed out that this analysis was seriously flawed – a criticism which attracted the support of the Office for Statistics Regulation[15] and which the Government has now accepted.[16] Its own analysis suggests that at least 3.4%[17] (or 15 times as many cases) are successful.

15. Despite acknowledging the fundamentally flawed basis for the IRAL recommendation, and despite opposition from a majority of those who responded to the consultation,[18] by clause 2 of the Bill the Government seeks to implement that recommendation. This is primarily said to be because these cases are – in the Government's view - 'a disproportionate use of valuable judicial resource'.[19]

16. PLP strongly opposes the inclusion of clause 2 in the Bill. In short, the streamlined procedure for *Cart* judicial reviews,[20] together with the high test for permission in *Cart* cases,[21] provides a proportionate means of achieving the aim – which the Government commends[22] – 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." An entirely appropriate and proportionate amount of judicial resource is used in identifying and correcting errors of law with potentially catastrophic consequences for the individuals concerned.

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[15] Public Law Project, "Government Judicial Review Numbers are wrong: Stats regulator concurs", available at: https://publiclawproject.org.uk/latest/the-governments-judicial-review-numbers-are-wrong-stats-regulator-agrees/
[16] See the analysis at Annex E of Judicial Review Reform: Government Response and in the Impact Assessment accompanying the Bill.
[17] Impact Assessment, §55
[18] Judicial Review Reform: Government Response, §30-31 (p13)
[19] Judicial Review Reform: Government Response, §36-37 (p14); see also §12(1) (p7).
[20] Under Civil Procedure Rule 54.7A, if the Judge on consideration of the papers considers that the threshold for permission is met, the Upper Tribunal and the respondent to the appeal have 14 days in which to request an oral hearing. If no such request is received, the refusal of permission is quashed without a hearing and remitted to the Upper Tribunal to reconsider. In most cases, no request for a hearing is made.
[21] CPR 54.7A requires both an arguable case with a realistic prospect of success that both the First-tier Tribunal and the Upper Tribunal have erred in law *and 'that either – (i) the claim raises an important point of principle or practice; or (ii) there is some other compelling reason to hear it'.*
[22] See §51 of the Judicial Review Reform Consultation document.

Case study: Sri Lankan refugee *sur place*

SR (Sri Lanka) v. SSHD PA/03767/2017; C4/2018/2337.

SR, a Sri Lankan national, feared persecution in part because of his involvement in diaspora activities in the UK. His appeal was dismissed by the First-tier Tribunal, and he was refused permission to appeal. Following his application for a *Cart* judicial review, the refusal of permission to appeal was quashed on the ground that the First Tier Tribunal had failed to consider the evidence of the Applicant's diaspora activities in the UK and whether, in light of the evidence and in particular the arguable change in conditions in Sri Lanka since 2013 (when the Upper Tribunal had given Country Guidance on Sri Lanka), he would be at risk on return. The Upper Tribunal found that the First-tier Tribunal had made an error of law and decided to hear this case to give new guidance on risk on return for those involved in diaspora activities. Before the hearing in the Upper Tribunal, the Home Office conceded the appeal, accepting that SR was a refugee.

Without the possibility of a Cart JR, SR could have been sent to Sri Lanka, where he has a well-founded fear of persecution.

Case study: separating a family

The claimant in this case was in a relationship with a British citizen and they had two children, who were also British citizens. The claimant's partner suffers from serious health conditions. The claimant's argument that removal would breach their right to respect for their family life was dismissed by the First-tier Tribunal and permission to appeal refused. Following a *Cart* judicial review, the decision of the First-tier Tribunal was overturned. The Upper Tribunal allowed the appeal under Article 8. Without a *Cart* JR this family would have been separated.

An abnormal approach to defining success in judicial review

17. The analysis in the Consultation Response and Impact Assessment ('IA') adopts an unduly narrow definition of success which both artificially *deflates* the success rate and artificially *increases* the projected costs savings.[23] That is because the MOJ assume that a *Cart* JR is only successful if *not only* the refusal by the Upper Tribunal of permission to appeal is overturned, but permission to appeal is granted and the appeal against the First-tier Tribunal's decision allowed. It has therefore excluded all those cases where the *Cart* judicial review played its vital role in correcting an error of law in the Upper Tribunal's refusal of permission to appeal, but the subsequent appeal was dismissed.

18. This is not the normal approach to defining success in judicial review. It ignores the benefit that flows from a case which meets the *Cart* criteria being heard in the Upper Tribunal, allowing that more senior Tribunal to consider important points of principle or practice, and opening up the possibility of appeal to the Court of Appeal (thus preventing the Upper Tribunal from being insulated from the general courts system).

[23] Contrary to the assertion in the IA and Annex E that it is 'generally accepted' that this is the appropriate measure of success in a *Cart* judicial review (§58 IA), PLP set out in its consultation response why it considered that this was flawed: see §48. Joanna Bell also described an outcome as 'positive' where the refusal of permission was quashed, without also requiring consideration of the outcome of the subsequent appeal: Joanna Bell, "Digging for Information about Cart Judicial review cases" (UK Constitutional Law Blog, 1 April 2021)

19. A *Cart* judicial review should be regarded as successful if it results in the refusal of permission to appeal being overturned. Adopting that definition of success, the analysis in the IA suggests that the success rate is more like 5.7%[24] (some 25 times higher than what the IRAL panel thought) - meaning more than 1 in 20 cases is successful.

20. This might be regarded as a reasonable and appropriate success rate for challenges to decisions by a senior Tribunal but that view is surely fortified by the nature of the issues at stake. In any full assessment of the proportionate use of judicial resource, account needs to be taken of the weight of the interests. 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, 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. 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.

Case study: victim of domestic servitude at risk of re-trafficking

R (CL) v UTIAC (SSHD as Interested Party) CO/6671/2015

CL had been trafficked for the purposes of domestic servitude in a diplomatic household. Her appeal was dismissed by the First-tier Tribunal and she was refused permission to appeal. CL brought a *Cart* judicial review in which she argued that her case raised not only compelling reasons of risk on return but important points of legal principle and practice concerning inter alia:
(i) the correct legal approach to the assessment of the risk of retrafficking in domestic servitude cases; and (ii) the discriminatory impact of the immigration rules prior to April 2012 on diplomatic domestic workers 'tied' to employers vis a vis domestic workers in private households which are not.

After permission was granted for a *Cart* judicial review, the refusal of permission was quashed and the case eventually remitted to the First-tier Tribunal. The Home Office conceded the appeal granted CL refugee status before the rehearing in the First-tier Tribunal (Appeal Ref AA/02436/2014).

Without the possibility of a *Cart* judicial review, CL would have been *refouled* to a country where there was a serious risk she would be retrafficked. The Upper Tribunal would not have had the opportunity to clarify the important points of principle raised by her case.

21. As Lord Dyson JSC explained in the original case of *Cart*:

> "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

[24] The IA calculates that permission to apply for JR was granted in 5.69% of Cart JRs from 2012-2020 (§63), and that the usual outcome is that the case is remitted to the Upper Tribunal without a hearing (§64). This is supported by the High Court statistics in the tables at §78 which indicate there were only 12 substantive hearings between 2012-2020 out of the 331 cases in which permission was granted.

rights and EU law. In such cases, if the 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."

Countering the costs argument

22. The counter argument in favour of the inclusion of clause 2 is primarily said to be the cost of *Cart* cases and the use of valuable judicial resource. In reality, the costs are not great. The IA assumes that a High Court judge can consider at least five applications for Cart JR in a single sitting day. Even this assumption may be overstating the time taken to consider a single case. The total cost saved by abolishing the *Cart* jurisdiction is estimated at £364,000-£402,000 per year. This represents less than the Department for Digital, Culture, Media and Sport spent on its art collection in 2019-20.[25]

23. Moreover, this figure is inflated because it includes the cost of the Upper Tribunal rehearing the appeal in a successful case. This would constitute a cost saving resulting from allowing unlawful decisions to stand: those costs would only be saved because the Upper Tribunal's unlawful refusal of permission to appeal was immunised from challenge.

24. **For reasons set out above, clause 2 should be removed from the Bill. The importance of what is at stake for individuals and for the rule of law in allowing decisions of the Upper Tribunal to be challenged in limited circumstances justifies the limited and proportionate use of judicial resource in a *Cart* JR.**

[25] The Daily Mail, https://www.dailymail.co.uk/news/article-8975691/Major-probe-reveals-public-sector-squanders-5-6bn-cash.html