Public Law Project

Judicial Review and Courts Bill

Briefing on House of Commons Committee stage amendments

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.

2. We have 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 as and we briefed Parliamentarians on during the Bill's second reading.

3. This addendum to our second reading briefing identifies a number of amendments tabled for consideration by the Bill committee on **Clauses 1 and 2**. Focusing on the procedural and access to justice issues in respect of which PLP has relevant expertise and experience, we state the reasoning behind these amendments and why we support their inclusion.

4. **Clause 1 amendments**

Amendment No. 12 tabled by Andy Slaughter, MP (Labour)

Clause 1, page 1, line 8, leave out from *"order" to the end of line 9."*

4.1 - Purpose

This amendment would remove the provision for making quashing orders prospective-only.

4.2 - Why PLP supports this amendment

- The power to issue quashing orders which only have prospective effect, or that have limited retrospective effect, is a power that goes beyond that which the Independent Review of Administrative Law (IRAL) Report recommended. The Government has yet to meaningfully justify with evidence why this additional and more radical proposal is needed. Whereas even a suspended quashing order could at some future stage apply to past conduct which was unlawful, a prospective-only order would enable a court to declare that unlawful past conduct could not be quashed and remedied.

- **Impact on claimants and the broader group of affected individuals:** The prospective-only effect places individuals in a situation where, even if they succeed in their judicial review, they could be left without an effective remedy and with a hollow victory. Consider, for example, ***R (British Medical Association) v Secretary of State for Health* [2020] EWHC 64 (Admin)**. Here, the Health Secretary issued

regulations 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 and the suspension did not come to an end where the employee was acquitted or where proceedings were withdrawn. This power had never been exercised and the British Medical Association brought this case as a matter of principle to protect potentially innocent NHS employees from losing their pensions. Finding the regulations to be unlawful, the judge granted a quashing order. Given that this case did not relate to an actual individual who was a victim of this power, the judge might have regarded a suspended or prospective-only order as "adequate redress", 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. Therefore, these powers would have been exercised against innocent NHS employees in the interim period.

- **No logical connection to reducing "political" cases by campaign groups:** Despite the Government's reference to "political" cases, these remedies will harm individual claimants. An individual claimant who has suffered harm will have no remedy on the facts of their case. The Government's frequent assertion[1] that there is an increase in litigation that crosses over into political terrain has not been evidenced. There are relatively few JRs brought every year; around 1,000 claims are granted permission. In fact, the number of judicial reviews is declining on the Government's own statistics.[2] There are a handful of cases that the Government refers to as having transgressed boundaries between law and politics,[3] and there is no logical connection between mitigating the impact of those cases and the measures in this Bill. In their review, IRAL found no evidence of judges stepping into the political realm, asserting 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. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.'[4]

- **Chilling effect on judicial review claims:** Prospective only remedies would have a chilling effect on claimants bringing judicial review claims. The huge cost of judicial review and lack of availability of legal aid already act as a barrier for many, discouraging them from bringing claims. Individuals who have suffered as a result of unlawful government decision-making will be further discouraged from seeking justice if they know that even if they win their claim an effective remedy may be denied to them if a judge must make a presumption in favour of using prospective-only quashing orders.

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[1] See, for example, the speech of Suella Braverman QC MP, the Attorney General of England and Wales, to Public Law Project's annual conference: https://www.gov.uk/government/speeches/judicial-review-trends-and-forecasts-2021-accountability-and-the-constitution.

[2] The latest quarterly judicial review statistics from 2 September 2021, for instance, indicate that the number of claims has declined by 16% compared to the same period in 2020: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2021/civil-justice-statistics-quarterly-april-to-june-2021

[3] In her speech noted above, the Attorney General mentioned: *Adams* [2020] UKSC 19, *Miller I* [2017] UKSC 5, *Miller II* [2019] UKSC 41, *Evans* [2015] UKSC 21, *UNISON* [2017] UKSC 51, and *Privacy International* [2019] UKSC 22.

[4] Independent Review of Administrative Law, (IRAL) IRAL Report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRALreport.pdf [15].

- **Lowering standards in decision-making**: In his speech on second reading, the Courts Minister stated that the Bill supports "a very important principle of judicial review", which was "better public administration of the law in the best interests of our constituents". Judicial review is, indeed, extremely important in upholding high standards of public administration. It is an excellent incentive for public bodies to make decisions lawfully. As the Government submission to IRAL acknowledges, judicial review ensures "that care is taken to ensure that decisions are robust", which "improves the decision."[5] If claimants are discouraged from bringing legitimate cases, there is a risk that standards of decision-making may be lowered in consequence of these changes.

- **Bringing the judiciary into the political arena:** When deciding whether to issue a weakened remedy or to grant an ordinary quashing order, judges will have to consider the likely future actions of the public bodies and would have to speculate about what administrative consequences the order would have. It is difficult to see how these are judicial assessments and within the judicial expertise and experience. Indeed, some judges have previously described these assessments as a job they are "ill-equipped to undertake."[6] This would be an especially regrettable and ironic consequence when the Government's avowed aim is to prevent judges stepping into the political realm.

- **Parliamentary sovereignty:** A judge's role in judicial review is to uphold the will of Parliament, ensuring that public bodies and Government ministers exercise their powers within the four walls of the empowering statute. If a court issues a prospective-only quashing order, it is effectively saying: 'Even thought the public authority acted outside of the powers that Parliament granted to it, we must pretend that this past action was lawful and we are only going to do something about it moving forwards.'

5. **Amendment No. 13** tabled by Andy Slaughter, MP (Labour)

Clause 1, page 1, line 9, at end insert—

"(1A) Provision under subsection (1) may only be made if the court considers that it is in the interest of justice to do so."

5.1 - Purpose

This amendment would limit the remedies in subsection (1) to where the court considers it is in the interests of justice.

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[5] HM Government, 'Summary of Government Submissions to the Independent Review of Administrative Law (2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976219/summary-of-government-submissions-to-the-IRAL.pdf [29]

[6] 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].

5.2 - Why PLP supports this amendment:

- The intention behind these new subsections is to limit the use of the new remedies to "exceptional circumstances" where it is in "the interests of justice". In their speeches in second reading, the Secretary of State for Justice and Laura Farris MP both referred to **HM Treasury v Ahmed [2010] UKSC 2** as an example of the narrow category of cases where they foresee a suspended or prospective-only quashing order being used. However, the current wording of the Bill allows for the power to be used across a much wider range of cases. There is no language limiting these orders to "exceptional circumstances" and, in fact, there is a presumption as to their use in all cases.

- The proposed amendment makes it clear that, even if it were to be conceded that **Ahmed** is an appropriate example, modified quashing orders ought to be confined to rare cases. The amendment supplements the list of criteria provided in the new s.29A(8) and would serve to further clarify that, in many cases it would be wholly inappropriate to grant a suspended or prospective-only quashing order.

6. **Amendment No. 15** tabled by Andy Slaughter, MP (Labour)

Clause 1, page 2, line 4, at end insert—

"(5A) Where the impugned act consists in the making or laying of delegated legislation (the impugned legislation), subsection (4) does not prevent any person charged with an offence under or by virtue of any provision of the impugned legislation raising the validity of the impugned legislation as a defence in criminal proceedings. (5B) Subsection (4) does not prevent a court or tribunal awarding damages, restitution or other compensation for loss."

6.1 - Purpose

This amendment would protect collateral challenges by ensuring that if a prospective only or suspended quashing order is made, the illegality of the delegated legislation can be relied on as a defence to criminal prosecution.

6.2 - Why PLP support this amendment:

- The purpose of this amendment is to protect collateral challenges. If the court makes a modified quashing order following a successful challenge to delegated legislation, this amendment ensures that it does not prevent the illegality/invalidity of the delegated legislation being relied on as a defence to criminal proceedings. Further, it ensures that a person can rely on the invalidity of the impugned act in a claim for damages to compensate them for loss resulting from the unlawful act.

- 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."

- In an example taken from PLP's Briefing for Second Reading:
    - 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.
    - Another example is that if someone has paid tax under regulations that are later found to be unlawful but quashed only prospectively, that person would not be able to bring a claim against HMRC to get a refund of the money they paid under the unlawful regulations because they are deemed to have been lawful at the time the person paid the tax.

7. **Amendment No. 19** tabled by Andy Slaughter, MP (Labour)

    Clause 1, page 2, line 12, leave out *"must" and insert "may"*

7.1 - Purpose

This amendment would make clear that the factors which the court considers are a matter for its judgment.

7.2 - Why PLP support this amendment:

- The current use of "must" instead of "may" clearly directs a judge's reasoning and interferes with judicial independence and discretion. This is especially important where judicial review is discretionary and involves taking account of all the factors before it. A court must be able to do justice on the facts, not be nudged to decide the case favourably to the executive.

8. **Amendment No. 20** tabled by Andy Slaughter, MP (Labour)

    Clause 1, page 2, line 21, leave out *"or proposed to be taken"*

8.1 - Purpose

This amendment would remove the requirement to take account of actions which the public body proposes or intends to take but has not yet taken.

8.2 - Why PLP support this amendment:

- The Bill currently permits a court to grant a modified quashing order on the basis of action that a public body "proposes" to take, in that this is one of the factors in subsection (8). This amendment would remove the requirement to take account of actions which the public body "proposes" to take. Such proposals are too uncertain to form a legal basis for suspending a quashing order or making it prospective only and

any intentions indicated to the court could change in light of subsequent developments, leaving those affected potentially without any recourse. Therefore, this requirement is too speculative and nebulous and should not be a factor considered by the court when the weakened remedies could cause serious injustice.

9. **Amendment No. 20** tabled by Andy Slaughter, MP (Labour)

Clause 1, page 2, line 23, at end insert—

"(8A) In deciding whether there is a detriment to good administration under subsection (8)(b), a court must have regard to the principle that good administration is administration which is lawful."

9.1 - Purpose

This amendment would clarify that the principle of good administration includes the need for administration to be lawful.

9.2 - Why PLP support this amendment:

- The intention behind this amendment is to clarify that the principle of good administration includes the need for administration to be lawful. The executive and all public bodies are not entitled to act unlawfully. Therefore, in a society based on the rule of law, administration may only rationally be categorised as fully "good" when it is lawful. If the Bill is going to compel courts to consider the principle of good administration, courts should also have regard to this consideration when making its decision. Unlawful action, no matter how expedient, should not be viewed as "*good* administration".

10. **Amendment No. 23** tabled by Andy Slaughter, MP (Labour)

Clause 1, page 2, leave out lines 24 to 32 and insert—

"(9) Provision may only be made under subsection (1) if and to the extent that the court considers that an order making such provision would, as a matter of substance, offer an effective remedy to the Claimant and any other person materially affected by the impugned act in relation to the relevant defect."

10.1 - Purpose

The amendment would remove the presumption and insert a precondition of the court's exercise of the new remedial powers that they would offer an effective remedy to the claimant and any other person material affected by the impugned act.

10.2 - Why PLP support this amendment:

- If these orders are to exist, they should not be presumed and should be down to the discretion of the judge considering all the facts of the case. The Lord Chancellor said at the Second Reading that the Bill will "[give] judges greater flexibility in judicial review". However the inclusion of the presumption contradicts this stated aim by tying the judges hands so that they are required to use these new remedies in certain circumstances. If these powers are to be created, they ought to be the exception and not the norm, as the IRAL Report suggests and as a number of Government backbenchers including Sir Robert Neill MP and Jeremy Wright MP have suggested.

- A presumption is harmful in that it sets modified quashing orders as the starting point in all cases, which the judge then deviates from only if the court "sees a good reason" to do so. It is worth noting that even those who support such a presumption can only name a small list of cases where these remedies might be appropriate.

- This decision ought to be left to the discretion of the sitting judge. A judge is able to take account of all the factors in the case in a way that a statutory presumption cannot.

Clause 2 amendments

11. As highlighted in PLP's second reading briefing, 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.**

12. ***Amendment No. 26** tabled by Andy Slaughter, MP (Labour), Anne McLaughlin, MP (SNP) and Angela Crawley, MP (SNP)

    Page 3, line 14, leave out Clause 2

12.1 - Purpose

This amendment would remove Clause 2 of the Bill.

12.2 - Why PLP support this amendment:

- The proposal to oust the *Cart* 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[7] and which the Government has now accepted.[8] Its own analysis suggests that at least 3.4%[9] (or 15 times as many cases) are successful and PLP analysis suggests that the figure is nearer 5.7%.[10] The difference between 3.4 and 5.7% can be explained by considering the analysis undertaken in the Consultation Response and Impact Assessment ('IA') which adopts an unduly narrow definition of success. This narrow definition both artificially *deflates* the success rate and artificially *increases* the projected costs savings.[1] 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.

- 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).

- 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%[11] (some 25 times higher than what the IRAL panel thought) - meaning more than 1 in 20 cases is successful.

- Despite acknowledging the fundamentally flawed basis for the IRAL recommendation, and despite opposition from a majority of those who responded to the consultation,[12] 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'.[13]

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[7] 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/

[8] See the analysis at Annex E of Judicial Review Reform: Government Response and in the Impact Assessment accompanying the Bill.

[9] Impact Assessment, §55

[10] Public Law Project briefing on the Judicial Review and Courts Bill: https://publiclawproject.org.uk/content/uploads/2021/10/PLP-Judicial-Review-and-Courts-Bill-2nd-Reading-Briefing-clause-1-and-2.pdf

[1] 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)

[11] 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.

[12] Judicial Review Reform: Government Response, §30-31 (p13)

[13] Judicial Review Reform: Government Response, §36-37 (p14); see also §12(1) (p7).

- In reality, the costs are not great. The total cost saved by abolishing the *Cart* jurisdiction is estimated at £364,000-£402,000 per year.[14] This represents less than the Department for Digital, Culture, Media and Sport spent on its art collection in 2019-20.[15] Given the interests at stake in *Cart* cases, including the protection of refugees who risk death and ill-treatment and the poorest members of society unlawfully denied welfare benefits, this cost is pre-eminently worth it and represents a trivial fraction of government spending.

- In addition, it is wrong to assume that *Cart* judicial reviews represent a "third bite of the cherry". A claimant can only pursue such a judicial review when the First-tier Tribunal has made a serious error of law and when the Upper Tribunal has unlawfully refused permission to appeal against that error of law. That is, where the Upper Tribunal takes no steps to correct a serious error of law. This is why the Administrative Court must step in. A *Cart* judicial review represents a situation where the claimant was not given a proper first bite of the cherry, not an illegitimate third bite.

- PLP strongly opposes the inclusion of clause 2 in the Bill. In short, the streamlined procedure for *Cart* judicial reviews,[16] together with the high test for permission in *Cart* cases,[17] provides a proportionate means of achieving the aim – which the Government commends[18] – 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.

13. ***Amendments**

- At Committee stage of a Bill, members are able to table an amendment to leave out a clause but it will not be voted on. Instead, each clause is subject to a clause stand part debate which is the opportunity to vote against the clause itself. As Labour and SNP are also seeking debate on Clause 2 to speak to its issues, both parties have tabled amendments. This allows the to speak to the issues with the clauses as a whole prior to any clause stand part debate which takes the form of a vote on the whole clause.

[14] See the Ministry of Justice impact assessment on ousting *Cart* judicial reviews: https://publications.parliament.uk/pa/bills/cbill/58-02/0152/JRImpactAssessmentFinal.pdf
[15] The Daily Mail, https://www.dailymail.co.uk/news/article-8975691/Major-probe-reveals-public-sector-squanders-5-6bn-cash.html
[16] 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.
[17] 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'.*
[18] See §51 of the Judicial Review Reform Consultation document.