Public Law Project

Public Law Project briefing on the Judicial Review and Courts Bill for Report Stage in the House of Commons

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We are researchers, lawyers, trainers and public law policy experts. The aim of all of our work is to make sure that state decision-making is fair and lawful and that each person can hold the state to account.

For over 30 years we have represented and supported people marginalised through poverty, discrimination or disadvantage when they have been affected by unlawful state decision-making.

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Executive summary and recommendations

1. As currently drafted, the Judicial Review and Courts Bill will make this and future governments less accountable for their actions and make it harder for people to require public bodies to obey the law and defend their rights through the courts.

2. Clause 1 and Clause 2 are of particular concern. Clause one weakens a crucial public law remedy obtained from judicial review that gives effective redress to victims of illegal acts and Clause two abolishes an important judicial check against errors made in the tribunals system. These two changes increase the risk that vulnerable individuals will be left without effective legal protection when they need it most.

3. This briefing for the Commons Report Stage supplements PLP's Second Reading and Committee Stage briefings, and in particular responds to important themes and arguments that have developed during and post Committee Stage.

4. Recommendations:
    a. Clause 1: PLP supports the amendments tabled by Wera Hobhouse MP and Andy Slaughter MP (see below).

    b. Clause 2: PLP recommends that Clause 2 be removed from the Bill.

Clause 1

Explanation of prospective only and suspended quashing orders

5. When people have been affected by an unlawful decision made by a public authority, their last resort is judicial review. Through this legal process a judge will determine if the actions by that authority were lawful or unlawful. Judicial review does not consider whether that decision was wise, politically acceptable or whether the judge personally agrees with the decision. These would be political matters for parliamentarians and not legal matters for a judge.

6. One of the remedies a court can issue in judicial review when it finds that a public authority has acted unlawfully is a quashing order. A quashing order nullifies the illegal decision as though it had never been taken and is therefore a powerful tool which ensures that unlawful public body decisions can be overturned and those who have suffered the consequences of unlawfulness can obtain real redress. The alternative is that illegal public decisions will have serious consequences for people's rights and lives despite violating the law.

7. Clause 1 of the Bill creates a presumption that a judge issuing a quashing order should make it 'suspended' or 'prospective only'.

8. 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.
9. 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. The creation of a presumption in favour of using suspended and prospective only quashing orders – a presumption which judges would be obliged to follow - would limit the effectiveness

of the remedies that can be issued by a court when it finds that a decision is unlawful and would interfere with a judge's discretion to make their own assessment of the appropriate remedy in each individual case. That is why this clause will weaken the accountability of public decision-makers - including in this and future governments - and undermines the rule of law.

Why the presumption should be removed

11. **Justice:** The presumption places victims of unlawful actions in an unfair position. It means that, unless a court finds good reason, a judge must issue a weakened quashing order that will favour the public body by not immediately overturning the illegal act carried out by the public body. By imposing the legal consequences of quashing orders only on future conduct, these remedies place individuals in a situation where, even if they succeed in their judicial review, they could be left with a hollow victory. PLP has produced a series of real case studies addressing how clause one could weaken remedies for vulnerable claimants, which are available here.

12. **Accountability:** If the use of such orders becomes commonplace – which is clearly the intention behind the presumption - remedies will insulate public bodies, including the government, from scrutiny and make it more difficult for decision-makers to be held to account. These weakened remedies would discourage individual claimants from bringing judicial review claims, which are brought as a last resort and often at considerable expense and inconvenience to claimants.

13. **Good administration:** Judicial review helps public authorities to make good, fair and legal decisions. The potential for bad administrative practices and decision-making may be increased where judicial review is less effective.

14. **Legal certainty:** As senior judges have acknowledged, one of the benefits of the current system of quashing orders is its simplicity. Whilst being presented as a measure which promotes certainty, these new remedies in fact generate significant uncertainty in terms of how they are to operate (such as the "good reasons" that a court will accept for not imposing a weakened quashing order) and are likely to result in expensive post-judgment satellite litigation. This uncertainty, together with increases in costs, will create yet another practical barrier to individual claimants bringing judicial review claims in the first place.

15. **Keeping judges out of politics:** Under Clause 1, 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. They will need to do this to figure out whether there are "good reasons" not to impose the weakened order. This in fact risks bringing the judiciary into the political arena because it is difficult to see how these are within judicial expertise and experience. Indeed, some judges commenting on comparable provisions have previously described these assessments as a job they are 'ill-equipped to undertake.'[1] This would be an especially regrettable and ironic consequence when the Government's avowed aim is to prevent judges stepping into the political realm.

16. **Judicial discretion:** Contrary to claims made by the Minister that Clause 1 would increase the range of remedies available to courts and therefore enhance judicial discretion,[2] the creation

[1] 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].

[2] See, for example, the Lord Chancellor's speech at the second reading debate of the Judicial Review and Courts Bill, House of Commons Hansard 26 October 2021 Vol. 702 Col. 192: "This Bill simply remedies that measure of

of a presumption that such remedies should be used does the exact opposite. Presumptions by definition reduce flexibility, not increase it.

17. **Existing controls on quashing orders:** It should also be noted that 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 regulated and further legislative action is not justified.

18. **Unjust criminalisation:** The 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 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 act as if it had been 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.' We agree and believe that collateral challenges should be expressly preserved in the Bill.

19. **Contrary to IRAL recommendations:** 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 and as the chair of the Justice Committee (Sir Robert Neill) also suggested.[3]

Points on Clause 1 to address from Committee Stage

20. **Accumulation of jurisprudence:** During committee stage, a new argument deployed by the Government to justify the presumption is that it is needed to 'accumulate jurisprudence' or encourage the courts to reach early decisions about how they will use the provision and thereby provide clarity in interpretation. However, there is no good reason why the courts need a presumption to consider whether to issue a suspended or prospective-only order. Even without a presumption, a public body can raise the issue in litigation and a court can consider it. The accumulation of jurisprudence could occur without the introduction of a presumption. Ministers have, therefore, not made an effective case in favour of one.

21. **Unintended consequences:** In committee, the Minister suggested that limiting the retrospective effect of remedies could mitigate the potential negative and unintended consequences that some public interest judicial reviews could have. For example, if a statutory

inflexibility by giving the judiciary the power to issue a suspended—or, indeed, a prospective—quashing order, allowing the Government a reasonable period of time to review the orders and/or the legislation itself."

instrument concerning social security is quashed immediately it could remove all the social security protections provided for in that statutory instrument because they would no longer have any legal effect. This argument is not at all convincing. The mere fact that some judicial review cases could potentially produce unintended consequences does nothing to argue in favour of a presumption. There may well be a case for extending the range of remedies to include suspended quashing orders, but the Government has not effectively made the case for a presumption.

22. **Courts support Parliament sovereignty:** During the committee debate, Sir John Hayes MP suggested that through judicial review the judiciary was becoming an 'alternative source of power'[4], trespassing on Parliament's territory as the UK's sovereign lawmaker.

    a. This analysis conflates executive and parliamentary power. Whilst the judiciary does indeed act as a check on the executive by requiring the executive to obey the law as set by Parliament, the courts have no power to review the legality of an Act of Parliament or set aside any decision made by Parliament. The courts have no power to be a challenger to Parliament.

    b. A judge's role in judicial review is to uphold the will of Parliament as expressed in a statute, ensuring that public bodies and government ministers exercise their powers within the law As Lord Reed, President of the UK Supreme Court, put it:

        i. "In declaring [an executive act] to be invalid…the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned." - R (Public Law Project) v Lord Chancellor [2016] UKSC 39

    c. 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.'[5]

23. **Low volume of judicial review:** The Government's assertion – made throughout the Bill's Second Reading and in Committee Stage – was that there is an increase in litigation that crosses over into political terrain.[6] This claim is not born out by the evidence.

    a. There are in fact relatively few judicial reviews brought every year; around 1,000 claims are granted permission. The number of judicial reviews is declining on the Government's own statistics.[7] There are a handful of cases that the Government refers

[4] Judicial Review and Courts Bill Deb, 23 November 2021, c402.
[5] 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].
[6] Suella Braverman MP, the Attorney General of England and Wales: Judicial Review Trends and Forecasts 2021: Accountability and the Constitution (Public Law Project, 19 October 2021): https://www.gov.uk/government/speeches/judicial-review-trends-and-forecasts-2021-accountability-and-the-constitution; see also R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent) [2021] UKSC 56.
[7] 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

to as having transgressed boundaries between law and politics,[8] and there is no connection between mitigating the impact of those cases and the measures in this Bill.

Recommendations: Clause 1

24. PLP's position remains that Clause 1 should be amended to remove the presumption and make clear that these modified remedies should be restricted to exceptional cases. We therefore support the following Report Stage amendments to Clause 1:

    a. **Amendment No. 1 tabled by Wera Hobhouse, MP (Liberal Democrats)**
    Clause 1, page 1, line 8, leave out from "order" to end of line 9

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

    b. **Amendment No. 4 tabled by Wera Hobhouse, MP (Liberal Democrats)**
    Clause 1, page 2, leave out lines 24 to 32

    Explanatory statement: This amendment would protect the discretion of the court by removing the presumption in favour of issuing suspended, prospective-only quashing orders.

    c. **Amendment No. 24 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 is satisfied that it is in the interest of justice to do so."

    Explanation: The insertion of this subsection would limit the use of any new remedies issued under clause one to where in the court's view it is in the interests of justice.

    d. **Amendment No. 25 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."

    Explanation: In addition to removing the presumption, this amendment would make it a precondition of the court's exercise of the new remedial powers that they should offer an effective remedy to the claimant and any other person materially affected by the impugned act. This would offer a stronger degree of protection to claimants than Hobhouse's amendments.[9]

    e. **Amendment No. 26 tabled by Andy Slaughter, MP (Labour)**
    Clause 1, page 2, line 4, at end insert—

[8] 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.
[9] Note: This amendment is an alternative to Wera Hobhouse MP's amendment No.4 which would also remove the presumption and would offer a stronger degree of protection to claimants than Hobhouse's amendment.

"(5A) Where the impugned act consists in the making or laying of delegated legislation (the impugned legislation), subsections (3) or (4) do 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) Subsections (3) or (4) does not prevent a court or tribunal awarding damages, restitution or other compensation for loss."

Explanation: 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 in criminal proceedings. This would prevent individuals from being criminalised under defective and illegal ministerial powers.[10]

f. Amendment No. 27 tabled by Andy Slaughter, MP (Labour)
Clause 1, page 2, line 12, leave out "must" and insert "may"

Explanation: This amendment would make clear that the factors which the court considers before making a modified quashing order are a matter for the court's discretion.

g. Amendment No. 28 tabled by Andy Slaughter, MP (Labour)
Clause 1, page 2, line 21, leave out "or proposed to be taken"

Explanation: 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. Such actions are too uncertain to form a 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.

h. Amendment No. 29 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."

Explanation: 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.

i. Amendment No. 30 tabled by Andy Slaughter, MP (Labour)
Clause 1, page 3, line 13, at end insert –
"(5) After section 31A of the Senior Courts Act 1981 insert –
31B
It is recognised that judicial review is of fundamental constitutional importance to the rule of law, the accountability of public bodies and the government in particular, access

[10] Note: If Wera Hobhouse MP's amendment to remove the possibility of prospective-only quashing orders is successful, this amendment need only refer to subsection (3). If Hobhouse's amendment is not successful, this amendment should be tabled as drafted above which captures both suspended and prospective-only orders.

to justice and the protection of human rights and that limitations on access to judicial review should only be imposed where strictly necessary and proportionate."

Explanation: Parliament can sometimes use declaratory clauses to highlight the importance of certain constitutional principles, which provide a general signal to the courts of Parliament's perspective and provide a potential guide in cases where the courts find it appropriate and useful. It is also an important statement to the public on Parliament's priorities and beliefs. See, for example, s.38 of the European Union (Withdrawal Agreement) Act 2020, which declares that: "It is recognised that the Parliament of the United Kingdom is sovereign."

Clause 2

Explanation of Cart JRs

25. A 'Cart' judicial review is where the High Court can – in exceptional circumstances – review a decision of the Upper Tribunal to refuse permission to appeal a decision by the First-tier Tribunal. The purpose of Clause 2 is to 'oust' – or abolish – this type of judicial review.

26. Cart judicial reviews are mostly used in immigration and social security cases to identify serious errors in law. They have prevented the removal of people to hostile regimes where they risked torture and murder and brought justice to benefit claimants who had been treated unlawfully.

27. Cases where Cart JRs have been used concern matters of life and death. They are a vital safeguard and cost a relatively modest amount of money.

28. Clause 2 would effectively scrap Cart judicial reviews. The Government has not made the case for removing this vital safeguard, especially when the consequences for leaving these legal errors uncorrected are so great. In a series of real case studies, PLP has illustrated the jeopardy that vulnerable people would face if Cart judicial reviews were removed. Clause two would remove legal protection from those who need it most at the time they need it most.

Why Cart JRs should remain

29. **Volume:** 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[11] – a criticism which attracted the support of the Office for Statistics Regulation[12] and which the Government has now accepted. Its own analysis suggests that at least 3.4% [13] (or 15 times as many cases) are successful.

[11] Joe Tomlinson and Alison Pickup, 'Putting the Cart before the horse: The Confused Empirical Basis for Reform of Cart Judicial Reviews (UK Constitutional Law Association, 29 March 2021): https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/

[12] 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/

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

[13] Impact Assessment, §55

30. **Cost:** Despite acknowledging the fundamentally flawed basis for the IRAL recommendation, and despite opposition from a majority of those who responded to the consultation,[14] 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'[15] The impact assessment 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.

    a. The costs are not great. The total cost saved by abolishing the Cart jurisdiction is estimated at £364,000-£402,000 per year, which is a materially low sum in comparison the Department for Digital, Culture, Media and Sport spending on its art collection in 2019-20.[16] 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.

31. **Proportionate use of resource:** There is a restrictive permission test for Cart JRs[17], and a special streamlined procedure[18] is followed which means they make limited and proportionate use of judicial resource. As a result, Cart JRs make relatively limited use of judicial resource and provide a proportionate means of achieving their aim – which the Government commends[19] – 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.'

[14] Judicial Review Reform: Government Response, §30-31 (p13)
[15] Judicial Review and Courts Bill Deb, 9 November 2021, c173.
[16] The Daily Mail, https://www.dailymail.co.uk/news/article-8975691/Major-probe-reveals-public-sector-squanders-5-6bn-cash.html
[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] 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.
[19] See §51 of the Judicial Review Reform Consultation document.

Points on Clause 2 to address from Committee Stage

32. **Criminal courts backlog:** The inclusion of Clause 2 in the Bill was further backed by the Minister during committee on the basis of the criminal courts backlog.[20] The conflation of Cart judicial reviews with the criminal courts backlog is straightforwardly wrong. It is difficult to see how Cart is causing any backlog, given it has nothing to do with criminal trials. Criminal cases are dealt with by two courts in England and Wales: Magistrates Courts and Crown Courts. High Court judges, who hear judicial reviews, never sit in the Magistrates Court and only rarely sit in the Crown Court to preside over very serious and complex jury trials or sentencing when they are on circuit. Ordinarily, a lower-level circuit judge presides over Crown Court cases. Therefore, it is not obvious how Cart judicial reviews are promoting even slightly a criminal case backlog.

33. **"Bites of the cherry":** To date, many parliamentarians debating the Bill have assumed that Cart judicial reviews represent a "third bite of the cherry" - that is, where a claimant has already had two separate hearings but wishes illegitimately to have a third. This is not an accurate or fair representation of how the process works. 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 wrongly refused permission to appeal against that error of law. In other words, the Upper Tribunal has taken no steps to correct a serious error of law by the First-tier Tribunal. This is exactly why the Administrative Court must step in. Therefore, a Cart judicial review represents a situation where a claimant has not had a proper first hearing; that bite was sour, they are not seeking a 'third bite'. Therefore, the reasons given for abolishing Cart cases proceed on a false characterisation and should be reconsidered.

Recommendations: Clause 2

34. 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.

[20] Judicial Review and Courts Bill Deb, 9 November 2021, c173.