Amnesty International UK

Judicial Review and Courts Bill 2021-22

Submission to the Public Bill Committee

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Key Recommendations

Amnesty International UK propose the Bill is amended, at a minimum, to:

a) Remove entirely Clause 1(b): prospective-only quashing orders.

b) Limit suspended quashing orders in Clause 1(a) with a new sub-clause specifying that these may only be made when the court considers it in the interests of justice to do so, and only in exceptional circumstances.

c) Remove Clause 1(9), the presumption in favour of either order being made, and the consequential provision in Clause 1 (10).

d) Delete Clause 2 entirely.

Amnesty International UK

Amnesty International UK is a national section of a global movement of more than seven million people. We represent more than 600,000 individuals in the UK. We undertake research and action focused on preventing and ending grave abuses of all human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We are independent of any Government, political ideology, economic interest, or religion.

Introduction and summary

1. The Government claims this Bill will ensure that *"Judicial Review is available to protect the rights of the individuals against an overbearing state".* Regrettably, the reality is that it will have quite the opposite effect. In common with a raft of other recent or pending legislative and policy changes, this Bill risks weakening accountability - increasing the power of the state to act in violation of individual rights - and reduces proper oversight of its actions. Far from safeguarding judicial review, it jeopardises its utility and purpose by encouraging, and even purporting to mandate in some cases, the use of a 'remedy' for unlawfulness which is likely to be neither effective nor just. It also will remove entirely the vital safeguard of judicial scrutiny by the High Court for an otherwise self-contained Tribunal decision making system already of particular concern and where other legislation is currently making drastic inroads into access to effective justice. Moreover, the Government's publicly stated intent of using this as a blueprint or test run for introducing similar ouster clauses elsewhere shows a disturbing desire to insulate themselves from any repercussions for unlawful activity. An ouster is simply an escape clause from necessary scrutiny. This Bill will undermine both Parliamentary sovereignty and the rule of law.

2. Indeed, Parliament is being invited to pass this legislation without the full nature and consequence of what it would be doing being clearly before it. For example, the Nationality and Borders Bill will significantly curtail the capability of the Tribunal system to consider the safety and lawfulness of the Home Office's asylum and human rights decisions. Further, proposals to amend (and likely restrict) the Human Rights Act are imminent and threaten similarly to restrict the ability properly to challenge state decisions. When viewed alongside Clauses 1 and 2 of this Bill, the overall effect is likely gravely to undermine access to and delivery of justice in relation to government decisions in some of the most serious situations imaginable - such as whether someone will be expelled to a place where they may be

tortured, disappeared, executed or returned to the hands of slavers and traffickers. The recklessness with which the Government is pursuing its agenda on seeking to hold it accountable to the laws made by Parliament is writ large even in the provisions in this Bill – but the wider context needs similarly careful assessment.

3. Amnesty International UK is deeply troubled by this further increase in executive power, and the dilution of state accountability. We urge Committee Members to undertake careful scrutiny of this Bill and ask what justifies or requires this weakening of state accountability dressed up as adding to judicial powers and removing inefficiency. While it is true that this Bill does not go as far in dismantling judicial review as has been threatened (and we await further changes in that respect that may appear in guidance or elsewhere), it nevertheless will have significant and dangerous consequences. There is simply no justification for this kind of fundamental shift in the balance of power away from parliament and the courts towards the executive, and every reason to oppose it. The rule of law demands no less.

4. We propose amendments be made, at minimum, to:
    a. Remove entirely clause 1(b): prospective-only quashing orders.
    b. Limit suspended quashing orders in clause 1(a) with a new sub-clause specifying that these may only be made where the court considers it in the interests of justice to do so, and only in exceptional circumstances.
    c. Remove clause 1(9), the presumption in favour of either order being made, and the consequential provision in clause 1(10).
    d. Delete clause two entirely.

Clause 1

5. It is a basic tenet of good administration in this country that if a public authority acts unlawfully, that can and should be remedied. Judicial review is the mechanism by which ordinary people can challenge the decisions of those authorities, and the normal outcome of a successful claim that the state has acted unlawfully is that the act in question is 'quashed' (which recognises that the court has concluded it is unlawful – the order being confirmation of its decision).

6. Clause 1 of this Bill would provide specifically in the Senior Courts Act 1981 for quashing orders to be made which are either (i) suspended ('not to take effect until a date specified in the order' – with the unlawful decision being treated as valid until that date as a result of the order)[1]; or (ii) made to have no retrospective effect ('removing' or 'limiting' this, so that the unlawful decision is treated as if it was valid until the order was made)[2]. Subsection 1(8) sets out which factors the Court must consider in using its discretion to decide whether to make such orders.

7. The first of these gives the Government time to change or otherwise deal with the defect identified in its decision. While there may be a legitimate use of this power, as the Independent Panel of Administrative Law recognised in describing the case of R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills [2012] EWHC 201

[1] Through a new s.29(1)(a)
[2] Through a new s.29(1)(b)

(Admin)[3] – and it is arguable the discretion already exists to do so - there is a risk this may in other (potentially very many) cases lead to serious injustice for the claimant. As such, it should be made clear if these are provided for in statute that such orders must be exceptional and in the interests of justice.

8. The impact of prospective only ruling, however, is hard to see as ever being anything other than a way for the Government to escape the normal consequences of its unlawful actions. It is difficult to see how this can be positive for claimants, third parties or society and the constitution. The impact of a quashing order of prospective only or limited retrospective effect conferring validity on an unlawful action is likely to be profound – particularly for the claimant and third parties affected by the unlawfulness, but also for the fundamental principle that the Government must act lawfully.

9. Where a Claimant, for example, successfully challenges a particular decision or policy and shows it was unlawfully made, the court will recognise that in its judgment. Ordinarily that would mean the decision has no legal effect, should be re-taken, and remedies will flow to protect those affected as necessary. However, as a result of this Bill, through its consequential Order the court will be conferring retrospective validity on that decision, despite its own judgment – ordering in effect that the decision should be treated as having been valid (despite judging that it was not) until the quashing order was made – meaning that whatever was done to the Claimant under it was also valid. It could even both limit retrospective effect and suspend future effect for a lengthy period while the state sorts out whatever it did wrong. This suggests that the victim of an unlawful act of an 'over-bearing state' (which could include a human rights violation) may not get proper justice and the usual benefit from their challenge. It is hard to see how this could possibly be seen as an effective remedy in the majority of cases (which is what the European Convention on Human Rights requires under Article 13 for human rights violations).

10. It is also hard to see how this would not have a chilling effect on judicial review itself – if there is a substantial risk of a judgment which vindicates your claim but then an order being made which means that ruling that has no or limited impact on what has already happened to you (or even potentially also no future impact), it would need to be a deeply principled and public spirited claimant to go through the stress and financial risk of bringing a claim at all. Moreover, it could increase the barriers to obtaining legal aid for such a challenge, since the claimant needs to show tangible benefit from a successful challenge to obtain legal aid. There is therefore a serious risk that unlawfulness could go unchallenged.

11. Although it is arguable that these tools already exist, in National Westminster Bank plc (Respondents) v. Spectrum Plus Limited and others and others (Appellants) [2005] UKHL 41 the House of Lords (as it then was) expressed concern about "*non-retroactive rulings"* [15]. While the question was focussed on whether the Courts already had the power to order prospectively, it summarised the principled and practical arguments against doing so,

[3] Saying "*As a remedy, a suspended quashing order would have had more teeth. Such an order would have indicated that that the Regulations would be quashed within a couple of months of the Court's judgment unless the Secretary of State in the meantime properly performed his "public sector equality duties" and considered in the light of that exercise whether the Regulations needed to be revised. Such a remedy would have ensured that the Secretary of State was not left free to disregard his statutory duties in regard to the Regulations*" (IRAL Report at [3.54])

including that "*'selective' overruling, if only the successful claimant benefits from the change, is likely to mean that persons in like case are treated differently" [27]* and that *"with a ruling of this character the court gives a binding ruling on a point of law but then does not apply the law as thus declared to the parties to the dispute before the court…making new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges [28].* Lord Nicholls concluded that "*the objections in principle and difficulties in practice mentioned above have substance* and said any such jurisdiction should be applied "*altogether exceptionally"* [39-40]. He cited earlier in his judgment when examining judicial practice (at [12]), *'the traditional approach'* as stated by Lord Reid in West Midland Baptist (Trust) Association Inc v Birmingham Corporation [1970] AC 874, 898-899, a case concerning compulsory acquisition*:*

> *'We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong we must decide that it always has been wrong'*

12. Similarly, Lord Hope referred to any such prospective order being not ruled out only in "*a wholly exceptional case"* [74]. Critically, however, Clause 1(9) would make them the norm. It purports to create a presumption that where a quashing order having limited retrospective effect like this would "*as a matter of substance, offer adequate redress",* the Court must curtail its own order in this way, unless it "*sees good reason not to do so".* The same applies to 'suspended' orders. This is not, therefore, the simple addition of optional remedies for the court to make in its discretion, but an attempt to limit – indeed fetter – that judicial discretion and tilt it towards an outcome that reduces consequences for the state when it acts unlawfully.

13. Clause 1(10) specifically requires that in applying '*the test'* in clause 1(9) the Court must take into account '*in particular'* anything within clause 1(8)(e) ('*any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act*'). It is unclear from this additional requirement pointing the Court towards that subsection what the relationship is between clause 1(9) and clause 1(8) more broadly. It is also unclear why the factors in clause 1(8) should not more appropriately be left to the discretion of the Court.

14. Importantly, Clause 1(9) is silent as to who the court is meant to be considering when deciding whether such an order would offer adequate redress[4]. If the subject of the clause is the claimant in the case, then it will impact what may be huge numbers of individuals or organisations who may not have been part of the court case but may have also been affected by the unlawful act - as well as the impact on society and the rule of law itself. The result if so interpreted would therefore be to limit the benefit of a claim to the single claimant and (again) seriously reduce the impact on public authorities when they act unlawfully. Collateral challenge by others would also be unavailable. Currently, if a decision is found to be unlawful, that means that not only the judicial review claimant but anyone else who has been negatively impacted by the unlawfulness may potentially benefit or have private rights as a result. If an order is made which is considered adequate redress for the claimant but does not have to also consider redress for third parties and those third parties thereby

[4] Subsection 1(8) provides for consideration of the interests of third parties who would benefit from the quashing, but subsection 1(9) does not specify whether 'redress' includes for them as well as the claimant.

have their private rights extinguished, with the order conferring validity on an unlawful act, that would be even more deeply unjust.

15. Orders which limit retrospective effect are therefore not only deeply objectionable in themselves (it is hard to conceive of many claims where the outcome would be just for the claimant or third parties - 'adequate redress' is ill-defined and may not be interpreted as demanding an effective remedy), largely benefiting the state, but by further introducing a purported presumption and attempting to tie the hands of the court, this Bill risks serious injustice.

16. Indeed, the fact that subsection 1(9) purports to mandate a suspended or limited retrospective effect order only in cases where such an order offers 'adequate redress', demonstrates that the Government recognises that there will also be cases where such an order is made other than in such cases, presumably after considering the factors in clause 1(8). This clause thus explicitly contemplates and recognises that there will be circumstances where a claimant brings a challenge, proves unlawfulness, and the court makes one of these orders even though the claimant or others are nevertheless left without 'adequate redress' (because where it does amount to adequate redress, the order must be made). That cannot be appropriate.

17. Moreover, as Tom Hickman QC noted recently[5], this clause (while limiting judicial discretion) will have the bizarre effect of actually increasing judicial power and in this sense taking away from Parliament. He explains that by providing for judicial orders which uphold unlawful executive acts for a period of time and treat them as valid and in force until the order was made, the Bill is giving judges a "*quasi-legislative power",* including to override primary legislation. It will be providing for such a power in cases where the act that is the focus of the claim has already been judged to be unlawful. Moreover, in respect of prospective only quashing orders, the result of these will be for the judiciary to confer permanent validity on past unlawful acts (including statutory instruments). This could damage the relationship between parliament and the courts and introduces significant uncertainty. Rather than the usual expectation that if the outcome of a judicial review judgment will be deeply prejudicial or damaging to the public interest (such as the need to undo a large regulatory scheme as the Government describes in its factsheet) then parliament will enact legislation to sort that out, as he describes, the courts will be making those decisions themselves. This benefits the executive by also permitting them to avoid debate in parliament over whether such new laws should be made.

18. The clear impact of this clause will therefore (most strikingly in the case of prospective only orders in new Clause 1(b)) be to limit the impact of judicial review on executive power – to 'obfuscate' the effect of a court judgment and protect the state from the full consequences when it acts unlawfully (both legal and political). Rather than *"restoring the balance between government, parliament and the courts"* as the Bill fact sheet claims, this will tip that balance further towards the executive. Instead of protecting the deterrent to state overreach and encouragement of good administration of the 'judge over your shoulder', this Bill risks encouraging poor decision making and building injustice and impunity into executive action going forwards.

[5] https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act/

19. It is important to note that while it did suggest the introduction of an *'option'* [3.59] for suspended only orders, the Government's own Independent Panel on Administrative Law ('IRAL') rejected any wider reforms to judicial review in line with clause one. More generally, it did not find that there was any notable trend of judicial overreach in need of correction – explicitly favouring an approach that the courts should be trusted "*to properly observe the boundary between what sorts of exercises of public power (and issues in relation to the exercise of that power) should be regarded as justiciable and what sorts should be regarded as non-justiciable*" [2.68]. Moreover, they were keen to stress that (underlining added):

> "*To present judicial review in terms of an argument between the executive and the citizen is only part of the story. Protection of the individual, redress of grievance and defence of private interest are of course strong historical themes in the common law, and therefore there is some truth in the idea of judicial review as a vehicle for the protection of private interests and of a "rights-based" system of judicial review. But judicial review serves many other functions, in many of which government and public authorities have a significant interest. The efficiency and cost-effectiveness of judicial review proceedings are matters of both public and private interest, and are no doubt rated as highly by individual litigants as by government departments. The relationship of public bodies to judicial review may be a very positive one. <u>All public bodies including government departments have an interest in legality as an element in good administration</u>… Those government departments that gave an estimate of their cost in financial and human resources gave little indication that the cost was overwhelming or in any way disproportionate to the value of maintaining "the lawfulness of executive action*"…*<u>none of the 84 responses to the question whether specified grounds for review "seriously impeded the proper or effective discharge of central or local government functions" suggested that this was the case</u>*" [IRAL Report at 34]

<u>Clause 2</u>

20. Clause 2 will amend the <u>Tribunals, Courts and Enforcement Act 2007</u> to remove *Cart* judicial reviews (where the High Court reviews decisions of the Upper Tribunal to refuse permission to appeal decisions of the First-tier Tribunal). However, this ouster clause does not apply, by virtue of the new s.11A(4), where the decision <u>of the Upper Tribunal</u> involves or gives rise to questions as to whether it (a) has or had a valid application before it under section 11(4)(b); (b) is or was properly constituted for the purpose of dealing with the application; or (c) is acting or has acted— (i) in bad faith, or (ii) in fundamental breach of the principles of natural justice. It therefore appears as though there is some recognition that (very limited) supervision of this otherwise self-contained tribunal system should remain.

21. On its face the Clause appears to recognise some constitutional limit in excluding review where there is reason to think the tribunal system has been tainted by such things as bad faith, a fundamental breach of natural justice or misunderstanding of the extent of the powers given to it by Parliament. But Clause 2 almost entirely misses the mark by its focus on acts or omissions by the Upper Tribunal when the site of any such fundamental error or abuse of power will in all likelihood be in the First-tier Tribunal. That results from these exceptions being expressly confined by the language of the clause to such questions arising concerning the <u>acts of the Upper Tribunal</u>. They do not, therefore, apply where those questions arise in connection to the First-tier Tribunal decision which the Upper Tribunal

is itself considering. That is an important and concerning omission. If the First Tier Tribunal has erred in this way and the Upper Tribunal misses that, Clause 2 seeks to exclude the High Court even where such an abuse has taken place. The consequences of that for the individual, and the rule of law, will be grave.

22. *Cart* itself has provided a vital safeguard, ensuring the tribunal system is not insulated and thus that important points of law will be properly considered and fed into its jurisprudence, as well as – critically – that those people whose appeals are being heard within its confines are not wrongly affected by errors it makes. These people, including those whose asylum and human rights appeals are within the system (for these are the only kind of immigration appeals which the tribunal hears), are some of the most vulnerable imaginable. Errors of law can therefore expose them to some of the most severe consequences possible. From exile from home and family in the UK, to expulsion to a place where they may be tortured, disappeared, or executed, to return to the hands of traffickers or slavers for further abuse, it is difficult to conceive of how individuals could be wrongly abandoned to their fate in this way. The same applies to the other kinds of cases heard in the tribunal system, such as cases about access to benefits for disabled children. The Government has recognised in its impact assessment that the majority of those affected by this change will be those with protected characteristics.

23. Notably, Parliament is by this Bill in this clause being invited to take this step without the full nature and consequence of what it would be doing being put clearly before it. For example, while the Ministry of Justice is sponsoring this Bill to, by Clause 2, create an immunity for the tribunal system against any external review of its decision that it has not erred in law by its First-tier ruling, the Home Office is sponsoring the Nationality and Borders Bill to significantly curtail the capability of that tribunal system to consider the safety and lawfulness of that department's own asylum and other human rights decisions. The overall effect is to gravely undermine the delivery of justice in relation to Government decisions and appeals. That has not to date been given its due recognition and consideration.

A faulty analysis

24. In recommending reversal of *Cart*, the IRAL Panel relied upon Ministry of Justice and (and BAILLI database derived analysis) figures suggesting that an error of law on the part of a First-tier Tribunal had been identified and corrected in just 0.22% of all applications for a *Cart* judicial review since 2012. It has since been recognised even by the Government that those statistics are incorrect, with it proposing a success rate of around 3.4%. Even that figure has been disputed by expert assessment elsewhere, with Public Law Project suggesting that success is more approaching 5.7%[6].

25. Further, the method for defining success in these judicial reviews remains open to serious question and confusion[7]. As Joe Tomlinson and Alison Pickup pointed out in Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews,

[6] Public Law Project, Judicial Review and Courts Bill briefing for House of Commons Second Reading, §19

[7] See the excellent breakdown of this by Dr Joanna Bell of Oxford University in Digging for Information about Cart JRs U.K. Const. L. Blog (1st April 2021) available at https://ukconstitutionallaw.org/2021/04/01/joanna-bell-digging-for-information-about-cart-jrs/

> "*We do not know how many Cart judicial reviews get permission or are ultimately successful, but it is quite clear, on the empirical basis being relied upon for this proposal, that neither does the Government*[8]"

26. Not only is it difficult to say with certainty what the IRAL Panel would have recommended had it had a proper evidential basis for its assessment of the need to retain Cart, but without such figures, the Government's own position remains similarly flawed.

27. Behind the figures, however, remain real people. Individuals whose lives will not only be drastically impacted by erroneous decisions but could even have those lives put at risk. The acceptability of abandoning them[9] to errors made by a self-contained (and one whose delivery of proper justice is soon to be further restricted by new legislation) tribunal system in order to save judicial time for 'other matters' should be of the most serious concern.

An ouster blueprint

28. While the IRAL Panel did recommend reversal of *Cart*, it did not make a recommendation to do so through the use of an ouster clause. Indeed, it said of ouster clauses in general that "*there should be highly cogent reasons for taking such an exceptional course".*

29. The Government has made it absolutely clear that it regards this clause as a tester or blueprint for further clauses purporting to oust (exclude) the jurisdiction of the courts over other areas. In their press release for the Bill, the Ministry of Justice said:

> "*The legislation will not address ouster clauses in the way set out in the consultation. Instead, it is expected that the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation. This will draw a line under decades of uncertainty and confusion as to their proper use."* (MoJ press release, 21 July 2021[10])

The Government also said in its response to the consultation on this Bill that it intends to "*carry out an internal follow-up exercise to identify and review (with a view to potentially updating where necessary) the other ouster clauses currently on the statute book, including the ouster clause in Privacy International)."*[11] Further, in a recent Law Gazette article, it was reported that when *"pressed on this by former Treasury solicitor Sir Jonathan Jones, Buckland said he wanted to look not just at ouster clauses in the context of Cart but also 'what it may point the way to'"*[12].

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[8] J. Tomlinson and A. Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews', U.K. Const. L. Blog (29th Mar. 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/

[9] In their response to the government consultation, the Immigration Law Practitioners' Association (ILPA) gave some examples of the kind of cases that will be affected by this change. It pointed to successful Cart judicial reviews that include some of the most serious situations and errors in decision making that come before the courts: ILPA's response to the government's consultation on Judicial Review Reform, 28 April 2021, available at https://ilpa.org.uk/wp-content/uploads/2021/04/28.04.21-ILPAs-GRAL-response1.pdf

[10] https://www.gov.uk/government/news/new-bill-hands-additional-tools-to-judges

[11] At [55]

[12] https://www.lawgazette.co.uk/news-focus/news-focus-judicial-review-and-courts-bill-bigger-reforms-on-the-horizon/5109353.article

30. Ouster clauses, as the Government itself explains in its Bill factsheet, "*are provisions in legislation that limit the jurisdiction of the Senior Courts in relation to the use of a particular power*". To date, ouster clauses have not been fully upheld by the courts. The Government seeks to set a precedent with this clause for removing certain cases or areas from the scope of judicial review. The desire to get rid of judicial oversight in any area should be of the utmost concern to those who care about the rule of law and separation of powers. There is simply no evidence (and was no conclusion to this effect in the Government's own independent review of administrative law) that judicial review is currently so prejudicial to good administration that it needs to be done away with or significantly restricted. That is wholly unsurprising. That governments find judicial review at times to be inconvenient in restricting their freedom, including to make policies or decisions which are human rights abusive or otherwise unlawful, is no justification for attempting to avoid judicial scrutiny. To do so is inimical to the rule of law. If this approach is allowed to stand, there are obvious and serious concerns about what will follow.