Judicial Review and Courts Bill

(Part 1 – Judicial Review)

House of Commons Committee Stage

Briefing

November 2021

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. JUSTICE has put together separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") for the Committee Stage of the Bill, starting on 2 November 2021. This briefing addresses Part 1 of the Bill, which relates to judicial review. This briefing builds on JUSTICE's briefing ahead of the Bill's Second Reading in the House of Commons on 18 October 2021.[1]

3. JUSTICE responded to the Independent Review of Administrative Law ("IRAL") and the Government Response to IRAL (the "Consultation"), which included proposals similar to those in the Bill. Both of JUSTICE's responses[2] were informed by an advisory group of lawyers who have a range of judicial review experience, both for claimants and respondents, across the UK.

4. In summary, JUSTICE has several significant concerns with both Clause 1 and Clause 2 of the Bill. Judicial review is of critical importance to the UK's constitutional arrangement, the rule of law, access to justice, and in promoting good governance. However, Clauses 1 and 2 seek to limit this vital check on executive action. JUSTICE therefore supports the following amendments:
    a. Clause 1 (s. 29A(1)(b)) introduces prospective-only remedies in judicial review. This clause risks undermining individuals' ability to hold the government to account, erasing legal rights, and creating significant uncertainty in practice. **Section 29A(1)(b) should be removed (Amendment 12, 39, 40 and 41)**.
    b. Clause 1 fails to protect the ability of individuals to rely on the finding of unlawfulness of a measure in other contexts, for example as a defence to criminal proceedings. **A further subsection should be included to protect**

[1] JUSTICE, 'Judicial Review and Courts Bill Part 1 – Judicial Review) House of Commons Second reading Briefing' (September 2021).

[2] JUSTICE, 'The Independent Review of Administrative Law Call for Evidence – Response' (October 2020); JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021).

third-party rights and defences to rely on the unlawfulness of a measure where a remedy under s.29A(1) is ordered (Amendment 15, 16, 17 and 18).

c. Clause 1 (s.29A(8)(e)) requires the courts to consider actions which a public body has "proposed" to take. This provides little legal basis for those relying on such statements and introduces unnecessary uncertainty. **Reference to action "proposed to be taken" should be removed (Amendment 20).**

d. "Good administration", referred to at Clause 1 (s.29A(8)(b)) as a factor the courts must consider when exercising the new remedial powers, must also depend on public bodies acting in accordance with the law. **A new subsection should be included to clarify that the principle of good administration includes the need for administration to be lawful (Amendment 21).**

e. Clause 1 (s.29A(9) and s.29A(10)) contains a presumption in favour of the use of suspended quashing orders and prospective only quashing orders. This undermines the courts' remedial discretion and risks making the new remedial powers, which should only be used in exceptional circumstances, if at all, becoming the default. Further, s.29A(10) favours the assurances of the executive over other important considerations, in particular the potentially severe impact of suspending a quashing order or making it prospective only on claimants and third parties. **S.29A(9) and s.29A(10) should therefore be removed (Amendment 22).**

f. Alternatively, if s.29A(9) is not removed, either:

    i. S.29A(9) should be amended to introduce a precondition that the new remedial powers should only be exercised if they offer an effective remedy to the claimant and any other person materially affected by the impugned act (**Amendment 23**); or

    ii. S.29A(9) should be amended to specify that the presumption only applies if the new remedial powers would offer an effective remedy to the claimant and any other person materially affected by the impugned act (**Amendment 24**).

g. Clause 2 would severely restrict *Cart*[3] judicial reviews ("*Cart* JRs"). This type of judicial review is a crucial and proportionate safeguard against legal errors in the Tribunal system in decisions often involving the most fundamental rights for the people concerned. **Clause 2 should therefore be removed (Amendment 26).**

[3] *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

Quashing Orders – Part 1, Clause 1

5. A quashing order is a remedy a court can make after finding that a public body acted unlawfully. A quashing order makes the unlawful act null and void – it never had any legal effect,[4] and therefore its consequences must be "unwound."

6. Clause 1 subsection (1) inserts a new s.29A into the Senior Courts Act 1981. This introduces on a statutory footing two types of remedies: (i) a quashing order which does not take effect until a date specified by the court (s.29A(1)(a)) (we refer to these as suspended quashing orders ("SQOs")); and (ii) a quashing order which takes effect only from the point of court order onwards (s.29A(1)(b) (we refer to these as prospective only quashing orders ("POQOs")). These remedies may be used independently or cumulatively.[5]

Prospective only quashing orders

7. **JUSTICE is opposed to POQOs and recommends that that the Committee vote in favour of the following amendments that would remove s.29A(1)(b) from the Bill:**

Amendment 12 (or Amendment 39)
Clause 1, page 1, line 8, leave out from "order" to the end of line 9

Member's Explanatory Statement
This amendment would remove the provision for making quashing orders prospective-only.

Amendment 40
Clause 1, page 1, leave out lines 15 to 18

Member's Explanatory Statement
See explanatory statement to Amendment 39. (This is a consequential amendment following the removal of section 29A(1)(b).)

Amendment 41
Clause 1, page 2, line 2, leave out "or (4)"

Member's Explanatory Statement
See explanatory statement to Amendment 39. (This is a consequential amendment following the removal of section 29A(1)(b).)

[4] *SSHD v JJ* [2007] UKHL 45 [2008] 1 AC 385 at [27], Lord Bingham: "an administrative order made without power to make it is, on well-known principles, a nullity".

[5] 'Judicial Review and Courts Bill Explanatory Notes', para. 86.

8. POQOs were not recommended by IRAL and could significantly undermine the effectiveness of judicial review to the detriment of individuals' rights and the accountability of the government. In issuing a POQO, the courts will be determining that an unlawful measure should be treated as if it were lawful retrospectively.[6]

   a. **POQOs deny redress to those impacted by unlawful government action.** It is a key principle of the rule of law that individuals have access to an effective judicial remedy against unlawful measures.[7] However, when a POQO is used, a claimant who has been subjected to the unlawful measure, as well as others who are in a similar position to the claimant, will not have a remedy for the prior (or ongoing) impact of unlawful public authority action.

      As Sir Robert Neil said at the Second Reading of the Bill,[8] "*a future declaration of illegality will not of itself recompense a person who has lost a business, lost an opportunity or lost employment, or something of that kind."* Sir Robert has said that it is vital that the Bill does "*not allow the individual litigant who has suffered tangible loss as a consequence of an impugned decision to be left without a genuine and meaningful remedy*." However, this is exactly what s.29A(1)(b) risks. As the Government itself acknowledged in its Consultation the use of POQOs "*could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy*."[9]

   b. **It arbitrarily distinguishes between people who have been impacted by the unlawful measure before and after a court judgment**, undermining certainty, consistency, and equal treatment under the law.[10]

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[6] New ss.29A(4) and (5) set out the implications of doing this – the decision or act in question is to be treated as valid and unimpaired by the relevant defect for all purposes for the period of time before the prospective effect of the quashing order.

[7] *R v Commissioner of the Metropolis, ex p Blackburn* [1968] 2 QB 118, at p. 148E-G.

[8] Sir Robert Neil MP at the Second Reading of the Bill in the House of Commons (18 October 2021).

[9] Judicial Review Reform, The Government Response to the Independent Review of Administrative Law' (Consultation), para. 61

[10] See further, Jeremy Wright MP at the Second Reading of the Bill in the House of Commons (18 October 2021): "*Removing retrospective effect also presents a logical conundrum. A quashing order will be made only if the court believes that the decision was taken in such a defective way as to require it to be deemed unlawful and therefore of no effect. But removing retrospective effect requires the same court, at the same time, to determine that the decision was not so defective as to require all those subject to it up to the date of judgment to be protected from its impact. There may be circumstances where it is appropriate for the court to decide to do those two conflicting things at once, but they must be rare."*

c. **It undermines Government accountability, which in turn undermines good administration and the quality of decision-making**.[11] POQOs could allow the executive to act unchecked, safe in the knowledge that were the act to be unlawful the implications would be limited. Further, the possibility of judicial review and its consequences motivates public bodies to maintain high standards in their administration and ensure that it is lawful. As recognised by the Government's guidance on judicial review for civil servants "administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked".[12] As the summary of Government submissions to the IRAL states, judicial review ensures "*that care is taken to ensure that decisions are robust*", which "*improves the decision*".[13]

d. **It will likely have a chilling effect on judicial review.** Bringing a judicial review has many disadvantages to applicants, not least the costs, uncertainty, effort and length of the process. The key motivation for many applicants – for the impact of the measure on them to be remedied – will be lost if a POQO is made. As Anne McLaughlin MP has said "*Who would put themselves through all this for no tangible outcome?*"[14] Further, POQOs may result in claimants not being able to secure legal aid, which requires there to be "sufficient benefit" to the individual of the advice and representation.[15]

e. **It undermines legal and practical certainty.** The impact of a POQO and the transition between a measure being valid and then quashed going forward will be difficult and unwieldy to navigate, including for public bodies. By way of example, it is unclear if proceedings to pay a penalty notice could be brought against an individual for breach of an unlawful byelaw if the events occurred prior to the byelaw being quashed prospectively but the charges and/or proceedings are brought afterwards. Laws should be able to guide conduct and

[11] L. Platt, M. Sunkin and K. Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales', Journal of Public Administration Research and Theory 243 (2010), considering research showing the various benefits to local authorities and their public service provided by judicial review.

[12] Government Legal Department, 'The judge over your shoulder – a guide to good decision making' (2016), p. 31.

[13] 'Summary of Government Submissions to the Independent Review of Administrative Law', para. 29.

[14] Anne McLaughlin MP at the Second Reading of the Bill in the House of Commons (18 October 2021).

[15] Regulation 32 of the Civil Legal Aid (Merits Criteria) Regulations 2013 in relation to Legal Help.

enable persons to act in accordance with the law[16] – a position where a measure is both recognised as being unlawful but is also to be treated as if it were lawful is contrary to this and risks a significantly worse outcome.

f. As Professor Tom Hickman QC has pointed out, **it allows the courts to in effect "re-write the law retrospectively."**[17] The power at s.29A(1)(b) (combined with s.29A(5), see paragraph 11 below) to treat an unlawful measure as valid retrospectively could be used even where a measure contravenes primary legislation. This is a considerable transfer of power to the judiciary from Parliament (and Government). It risks important and difficult social policy and economic issues, which require and deserve Parliament's attention, including retrospectively validating previous unlawful measures if necessary[18], being decided by the courts.[19]

g. **It risks breaching the requirements in the European Convention on Human Rights ("ECHR").** The European Court of Human Rights has held that certain remedies that have prospective-only effect cannot be effective and therefore would violate the right to an effective remedy provide by Article 13.[20] The UK Government has indicated its wish to remain party to the ECHR and it is very possible that POQOs would not withstand a challenge before the European Court of Human Rights.

9. **POQOs are not necessary to address the Government's concerns**. The Government states that POQOs would ensure that "*the adverse effects of retrospective quashing may be avoided – such as severe administrative or economic consequences*."[21] We recognise that there will be circumstances where, despite the

[16] As one Government department made in its submissions to IRAL: "[t]he rule of law requires predictable rules around which citizens, businesses and government can plan their activities and lives" ('The Independent Review of Administrative Law', para. 2.62).

[17] T. Hickman 'Quashing Orders and the Judicial Review and Courts Act', (July 2021), UK Const. L Blog.

[18] See, for instance, the example provided by Professor Tom Hickman QC of a 2013 decision of the Supreme Court finding that regulations imposing penalties on persons claiming jobseekers' allowance who failed to undertake unpaid work were ultra vires. Parliament enacted retrospective legislation to validate historic benefit deductions as repayment was considered an unjustified claim on public funds.

[19] See further, Jeremy Wright MP at the Second Reading of the Bill in the House of Commons (18 October 2021): " *finding a decision to be unlawful but then saying that that unlawfulness applies only to those affected by it in the future and not in the past puts the court in a strange position.*"

[20] Ramirez Sanchez v. France [GC], 2006 §165-166. See further, 'Liberty's briefing on the Judicial Review and Courts Bill for second reading in the House of Commons', para. 14.

[21] 'Judicial Review Reform Consultation The Government Response', para. 82.

concerns set out above, it would not be appropriate to quash an unlawful decision. However, the courts have a wide remedial discretion which they can use to address these circumstances, and frequently do so.[22] In exercising their remedial discretion, the courts will consider a range of factors and will take into account the impact of quashing on certainty and *"the needs of good public administration*".[23] Where significant administrative disruption or "chaos" could result from a quashing order, the courts have the power to, and often do, issue a declaration instead. Research by PLP has shown that in challenges to statutory instruments, a declaration, rather than a quashing order, is the most common remedy following a successful judicial review.[24]

10. A recent example of the courts' exercise of remedial discretion is the case of *R (on the application of TN (Vietnam)) v Secretary of State for the Home Department.*[25] This case followed a decision that the Detained Fast Track ("DFT") system for determining asylum applications was unlawful because it was structurally unfair and unjust.[26] The Supreme Court held that despite the fact that the administrative scheme may be invalid for systemic unfairness, it does not follow that individual decisions made under that scheme are automatically nullified. Rather, appellants had to show that the rules had impacted unfairly on them for an error of law to be identified, in which case the determination on their asylum claim could be set aside as unfair and unlawful. However, a POQO would prevent such a flexible remedy. A POQO would mean that prior asylum applicants, regardless of the impact of the DFT on their individual case, would have no means of bringing a claim arguing that the DFT meant that the determination of their asylum claim was unfair – it would just be treated as lawful and valid in all circumstances.

Erasure of defences and private law rights based on the unlawfulness of a measure - s.29A(5)

11. Section 29A(5) provides that where an impugned act is upheld, either until the quashing takes effect (in respect of an SQO) or retrospectively (in respect of an POQO), it "*is to*

[22] See further, JUSTICE Response to Consultation, n.2 above, paras. 45 – 50.

[23] *Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union* [2011] UKPC 4 at [40] (Lord Walker).

[24] 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.

[25] [2021] UKSC 41

[26] A previous case *R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840 had established that the Fast Track Rules 2014 were structurally unfair, unjust and ultra vires and fell to be quashed. TN's appeal was heard under the Fast Track Rules 2005. TN's judicial reviewed the determination of her appeal. She argued that the Fast Track Rules 2005 also fell to be quashed

be treated for all purposes as if its validity and force were, and always had been unimpaired by the relevant defect". We have significant concerns about the impact of this on individuals' ability to defend themselves against unlawful measures or exercise their private law rights arising out of an unlawful measure. **JUSTICE therefore recommends that the Committee votes in favour of Amendments 15, 16, 17 and 18 which would protect third-party rights and defences where a remedy under s.29A(1) is ordered.**

Amendment 15
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) shall 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) shall not prevent a court or tribunal awarding damages, restitution or other compensation for loss caused to the claimant by the impugned act before the date on which the quashing takes effect."

Member's Explanatory Statement
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.

Amendment 16
Clause 1, page 1, line 13, after "subsection (2)" insert "and to subsection (5A)"

Member's Explanatory Statement
See explanatory statement to Amendment 15.

Amendment 17
Clause 1, page 1, line 16, after "subsection (2)" insert "and to subsection (5A)"

Member's Explanatory Statement
See explanatory statement to Amendment 15.

Amendment 18
Clause 1, page 2, line 1, at beginning insert "Subject to subsection (5A),"

Member's Explanatory Statement
See explanatory statement to Amendment 15.

12. Ordinarily, where a court has found a measure unlawful, even if it has not been quashed,

it is possible for individuals / bodies to rely on this finding of unlawfulness in criminal and civil proceedings –to defend themselves against criminal charges and to bring claims for compensation.

13. However, s.29A(5) precludes individuals from relying on the unlawfulness of a measure in other proceedings: denying individuals' defences to criminal charges and taking away their private law rights for compensation, restitution or any other damages. As IRAL recognised, this position would leave the law in a "*radically defective state*".[27] Many situations can be envisaged where this would result in significant unfairness. For instance:

    a. if one of the statutory instruments during the Covid-19 pandemic, which created imprisonable offences and high financial penalties, was found to be unlawful and the court granted one of the new remedies, anyone who breached the unlawful statutory instrument during any period of suspension would still be able to be prosecuted or charged under it. If a POQO was issued, those who were convicted on an offence would still have a criminal record, despite the measure being unlawful; and

    b. a person who has had to pay a tax under regulations that were subsequently found to be unlawful but quashed only prospectively, would not be able to bring a claim against HMRC to be refunded the money.[28]

    It cannot be justifiable for an individual to face the loss of their liberty or financial penalty on the basis of an unlawful measure.

14. An example of the potential wide-reaching and negative impacts on third parties of the new remedies, can be seen in recent case law relating to Covid-19. A number of changes proposed by the government that relaxed the standard of care for children under local government care were found to be unlawful as the government failed to consult with key parties representing the rights of the children.[29] However, had a POQO been issued in this case, the government would have in effect been protected from the

[27] IRAL Report, n.16 above, para. 3.66.

[28] A cause of action under the law of restitution exists for money to be returned where tax has been unlawfully extracted from a taxpayer by virtue of a legislative requirement. *Woolwich Equitable Building Society v IRC* [1992] STC 657; *Test Claimants in the Franked Investment Income Group Litigation v IRC* [2012] All ER (D) 188.

[29] *R. (on the application of Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577.

negative consequences of the amendments to the standard of care. Any children who suffered unlawful mistreatment and loss due to the (unlawful) reduced standards of care would then not be able to bring a claim.

The requirement to consider good administration – s.29A(8)(b)

15. Section 29A(8)(e) states that the court must consider "*any detriment to good administration that would result from exercising or failing to exercise the power"* to order the new remedies. The Explanatory Notes state that "*such consequences might include economic or financial instability resulting from the immediate quashing of a regulation, or the public authority being in a position where it had to immediately set up new arrangements, or pay compensation, or reverse actions taken pursuant to the quashed decision.*" **JUSTICE is concerned that this fails to recognise the value of lawful administrative action, and recommends that the Committee vote in favour of Amendment 21:**

> Amendment 21
> 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."
>
> ***Member's Explanatory Statement***
> *This amendment would clarify that the principle of good administration includes the need for administration to be lawful.*

16. It has been repeatedly stated that Clause 1 of the Bill will ensure good governance.[30] However, these statements appear to fail to recognise the importance of public bodies complying with the law in ensuring such good governance. As set out at paragraph 8.c above, a key element of effective and good administration is that it is also lawful, otherwise legislation and grounds of judicial review governing administrative and executive action lose their very purpose.

17. As the IRAL Report recognised, all of society, including public bodies, "*have an interest in legality as an element of good administration*"[31], as is also recognised by the

[30] See for instance, Government Response to Consultation, paras. 72 and 83.

[31] IRAL Report, Introduction, para.34.

Government's guidance on judicial review for civil servants.[32] Amendment 21 would ensure that in considering the potential impact on good administration that ordering, or not ordering, one of the new remedies would have, the courts take into account the value of public bodies complying with the law in ensuring "good administration."

The requirement to consider proposed executive actions - s.29A(8)(e)

18. S.29A(8)(e) states that the court must consider "*any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act*". The Explanatory Notes state "*this may concern actions to rectify any unlawfulness, or review a decision in light of the court's judgment*."[33] **JUSTICE considers that The Committee should vote in favour of Amendment 20, which would remove the words "*or proposed to be taken*" from s.29(8)(e) so that it only refers to undertakings.**

Amendment 20
Clause 1, page 2, line 21, leave out "or proposed to be taken"

Member's Explanatory Statement
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.

19. The requirement on the courts to consider any action "*proposed to be taken*" by a responsible body provides little or no legal basis to require the public body to act, especially if only said during submissions and not reflected in the court's judgment. The reality of public body decision-making, executive action and the legislative timetable, is that priorities and policy positions change, and resources and time may have to be diverted. In the meantime, the judicial review claimant and all others adversely impacted by the measure must wait – potentially continuing to be detrimentally impacted – with limited, if any, legal recourse against the defendant (or other relevant public body). Amendment 20 would reduce the uncertainty created from the courts being required to consider statements as to things that may or may not happen.

[32] This states that its purpose is "*to inform and improve the quality of administrative decision making*." The judge over your shoulder – a guide to good decision making' (2016), page 5.

In the same way the Parliamentary and Health Service Ombudsman in their 'Principles of Good Administration' state that "Good administration by public bodies means: Getting it right," which includes "Acting in accordance with the law and with regard for the rights of those concerned.

[33] Explanatory Notes, n.5 above, para. 92.e.

Presumption - s.29A(9) and s.29A(10)

Section 29A(9)

20. Section 29A(9) introduces a presumption in favour of the new remedies. Under this section, if the court has found a measure to be unlawful and is considering making a quashing order (s.29A(9)(a)), and it "*it appears to the court"* that one of the new remedies "*would, as a matter of substance, offer adequate redress*" (s.29A(9)(b)), the court is required to make either the POQO or SQO, unless it *"sees good reason not to do so."* JUSTICE is opposed to this clause which unnecessarily fetters remedial discretion, risks excessive litigation and creates the "default" position that the new remedies should be applied, when they should only be applied in exceptional circumstances, if at all. **We recommend that the Committee vote in favour of Amendment 22, which would remove s.29A(9), along with s.29A(10)** (see paragraphs 25 to 29 below).

> Amendment 22
> Clause 1, page 2, leave out lines 24 to 32
>
> ***Member's Explanatory Statement***
> *This amendment would remove the presumption in favour of using the new remedial powers in clause 1 and protect the discretion of the court.*

21. Section 29A(9) is a convoluted provision which introduces several steps and terms which will lead to increased arguments and submissions at the remedy stage of litigation, increasing the costs and length of litigation to the detriment of parties and the courts.

22. The Government states that s.29A(9) can "*direct and guide the court's reasoning to certain outcomes in certain circumstances*,"[34] notably where the remedies at s.29A(1) "*can provide adequate redress*."[35] However, the courts already seek to craft the most appropriate remedy for the circumstances before them. A court will issue a POQO / SQO if it is the most appropriate remedy; there is no need for a legislative provision telling the courts to do so.

23. IRAL chose not to recommend a presumption for suspended quashing orders, and nor did it recommend restricting judicial discretion to use alternative remedies.

[34] Judicial Review Reform Consultation, The Government Response, n.21 above, para. 96.

[35] *Ibid*, para. 98.

24. The presumption conflicts with the Government's stated aim of increasing remedial discretion,[36] by requiring particular remedies to be used in certain circumstances. As Professor Verhaus has stated in arguing for the deletion of the presumption: *"its inclusion could very well subvert the premise of reform – which is to reiterate remedial flexibility, and thus that remedial decisions should be based on reasoned analysis of all relevant factors implicated on the facts."*[37]

Section 29A(10)

25. In applying the presumption at s.29A(9), s.29A(10) requires the court to "*take into account, in particular*" anything under s.29A(8)(e).[38] This directs the court to give special consideration to anything which the public body with responsibility for the impugned act, which may or may not be the defendant,[39] has done or says it will do. **JUSTICE strongly oppose s.29A(10) and it should be removed from the Bill in accordance with Amendment 22.**

26. There are significant difficulties with making a POQO or SQO on the basis of statements made, or even undertakings given, by the defendant: First, only the claimant would be able to enforce the undertaking or statement, even though others will also be impacted by the defendant's non-compliance. Further, claimants may not have the funds, ability, or resources to bring the case back to court. Second, the recourse would only be against the defendant public body not any other public bodies who have said they would act. Third, in rejecting the introduction of a conditional quashing order, the Government recognised the practical difficulties with deciding whether a condition has been complied with[40] – the same concerns apply equally to court orders made on the basis of public body assurances, including the potential for further protracted and costly litigation.

27. The new remedies could have a significant impact in denying redress to those impacted by unlawful measure – ordering them based on public bodies' assurances not only risks uncertainty but also the further denial of redress. This can be seen in a development to

[36] See for instance, Explanatory Notes, n.5 above, para. 19. Deputy Prime Minister, Dominic Raab MP at the Second Reading of the Bill in the House of Commons (18 October 2021).

[37] J. N.E. Varuhas, 'Remedial Reform Part 1: Rationale', U.K. Const. L. Blog (3 November 2021)

[38] S.29A(8)(e) states "*so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act*".

[39] *Ibid*, para. 92.e.

[40] Judicial Review Reform Consultation, The Government Response, n.21 above, para. 68.

the below example provided by the Law Society:[41]

> If a person who has been deemed ineligible for a welfare benefit successfully challenges the eligibility criteria through a judicial review, but a prospective-only quashing order is applied, that person will not receive back payments of the benefit even though they have proven that they were unlawfully deemed ineligible. It is likely that the successful claimant (and any other benefit applicants rejected on the same grounds) would have to make a new application and wait for another decision to be made, during which time they will either receive no benefit entitlement or a lower rate. Furthermore, they would not receive back-payments of the benefit to which they would otherwise have been entitled, resulting in only a partial remedy.

28. In this scenario, the court may have ordered a POQO on the basis of Government assurances that a mechanism for ensuring back payments would be put in place. However, such a process may take longer than initially anticipated. In the meantime, the claimant, and others, continue to be denied the money they are due - which could very easily be the difference between whether they can afford their food and rent. Alternatively, the mechanism introduced by the Government may be limited to certain applicants or for a certain length of back payment, such that benefits applicants previously rejected would be forced to return to court, if at all possible, to argue over whether the mechanism introduced by the Government is sufficient.

29. The courts do already take into account steps that the executive or Parliament are intending to take[42] or have taken[43] (as well as now being required to by s.29A(8)(e)), and generally accept that the defendant will comply with the court's ruling on lawfulness.[44] However, it should be for the courts to determine in the circumstances of the case what weight should be given to public body assurances; to ensure that the most appropriate remedy is made, considering the difficulties with relying on assurances. The courts should not be required to preference these assurances at the expense of other considerations, in particular the impact on the claimant and third parties.

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[41] The Law Society, 'Parliamentary Briefing Judicial Review and Courts Bill', page 3.

[42] For example, in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, in refusing to make a declaration of incompatibility under the Human Rights Act 1998 regarding the prohibition of assisted suicide, the Supreme Court considered the fact that Parliament was "still actively engaged in considering associated issues" in the context of a private members bill in the House of Lords at the time.

[43] The courts will exercise their discretion to not provide a remedy if events have overtaken the proceedings. For instance, to refuse to quash a decision to disclose a report which had, by the date of judgment, already been disclosed (*R. v Sunderland Juvenile Court Ex p. G* [1988] 1 W.L.R. 398).

[44] *R (Langton) v Secretary of State for Environment, Food and Rural Affairs, Natural England* [2019] EWHC 597 (Admin) at [130] where the court was not persuaded that "declaratory relief" was required since Natural England had "indicated that it [was] ready to take any action required by the judgment".

Precondition of an effective remedy

30. **In the alternative, if the removal of s.29A(9) is not successful, we recommend that the Committee vote in favour of Amendment 23,** which would ensure that the new remedies are only used where they provide an effective remedy for the claimant and any other person materially affected by the unlawful measure. This amendment would also remove the presumption at s.29A(9) and s.29A(10). JUSTICE supports this for the reasons set out above.

> Amendment 23
> 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."
>
> ***Member's Explanatory Statement***
> *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 materially affected by the impugned act.*

31. The presumption at s.29A(9) only applies where the new remedies "*would, as a matter of substance, offer adequate redress in relation to the relevant defect*". However, the Bill does not prevent the courts using the new remedies in situations where "*adequate redress"* is not provided for the claimant or others impacted by the unlawful measure. JUSTICE considers that a safeguard should be introduced to directly address this.

32. By ensuring that the new remedies may only be used where the claimant and anyone else impacted by the unlawful measure still obtain an "*effective remedy*", Amendment 23 would:

    a. Help address the risk that claimants may be deprived of a remedy as a result of a POQO or SQO (see further paragraphs 8 above), thereby reducing the chilling effect of the introduction of these remedies on judicial review (see paragraph 8.d above).
    b. Provide the higher standard of "effective remedy" rather than "adequate redress," ensuring that claimants do have a full remedy and providing clarity as to the minimum bar which must be met before the new remedies can be

ordered (see further paragraph 34 below).

c. Clarify that the effective remedy should be for all those affected by the impugned act, and not just the claimant. This reflects the broader public interest of judicial review; the risk that POQOs and SQOs could negatively impact other third parties impacted by unlawful measure or who could potentially be impacted in the future (see further paragraph 35 to below).

Amendment to s.29A(9)

33. **In the alternative, if neither Amendment 22 nor 23 are successful, we recommend that the Committee vote in favour of Amendment 24 which would remove s.29A(10) and mitigate some of the negative consequences of s.29A(9),** by (a) specifying the presumption only applies if there is an "effective remedy; and (b) the effective remedy should apply to the claimant and any other person materially impacted by the unlawful measure.

Amendment 24
Clause 1, page 2, leave out lines 24 to 32 and insert—
"(9) If—
(a) the court is to make a quashing order, and
(b) it appears to the court that an order including provision under subsection (1) 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, the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so.

Member's Explanatory Statement
This amendment would require an effective remedy to the claimant and any other person materially affected by the impugned act.

Effective remedy

34. When exercising their remedial discretion in judicial review claims the courts starting position is that an effective remedy should be ordered.[45] The use of the words "*adequate redress*" at s.29A(9) risk unnecessarily lowering this bar to the detriment of those impacted by unlawful measures.[46] Using the term 'effective remedy' will provide greater

[45] "The Court will need a cogent reason if it is to exercise its residual discretion, to decline the claimant a practical and effective remedy, in a case establishing a material public law error on the part of the defendant public authority", The Hon Sir Michael Fordham, Judicial Review Handbook, Seventh Edition, para 24.3.

[46] As Joshua Rozenberg QC has pointed out why were the words "sufficient redress", "full redress" or just "redress" not used?, *A Lawyer Writes,* 'Fettering the courts' discretion' (July 2021).

clarity for parties and courts as to the meaning of the term, and will help avoid additional and costly satellite litigation. Further, explicit reference to effective remedy will help mitigate the risk of the new remedies, and in particular POQOs, breaching the UK's human rights obligations to provide an effective remedy for a violation of ECHR rights (see paragraph 8.g above).

The Claimant and any other person materially affected by the impugned act.

35. Amendment 24 would also provide clarity that in considering whether a remedy is effective the courts need to consider all those impacted by the impugned act. This would reflect the wider public interest in a judicial review application.[47] Unlike civil litigation, as IRAL recognised, judicial review is not purely about the "*protection of private interests*",[48] it is also about addressing the unlawfulness of administrative action for all those impacted. Amendment 24 would also help address the concerns discussed above (paragraphs 11 to 14) that third parties' rights and defences could be overridden by a court decision granting a POQO or SQO. It is therefore flawed that the precondition for using the presumption does not take into consideration the position of third parties not represented in court.[49]

Cart judicial reviews – Part 1, Clause 2

36. Clause 2 of the Bill, through a new s.11A in the Tribunal, Courts and Enforcement Act 2007, seeks to greatly restrict the possibility of judicial reviews of Upper Tribunal ("UT") refusals of permission to appeal a decision of the First-tier Tribunal (the "FTT") ("*Cart* JRs"). JUSTICE continues to oppose the removal of *Cart* JRs for the below reasons. **We recommend that the Committee vote in favour of Amendment 26, which would remove this provision from the Bill**

Amendment 26
Page 3, line 14, leave out Clause 2

Member's Explanatory Statement
This amendment would remove Clause 2 of the Bill.

[47] For instance, see *State of Mauritius v CT Power Ltd* [2019] UKPC 27 at [44] "the judicial review jurisdiction…exists to safeguard the public interest".

[48] IRAL Report, Introduction, para. 34.

[49] See further, Tom Hickman QC, 'Quashing Orders and the Judicial Review and Courts Act', (July 2021), UK Const. L Blog.

Cart JRs prevent serious injustices

37. The Government recognised in the Consultation that the removal of *Cart* JRs "*may cause some injustice*".[50] However, limiting oversight of the UT's permission decisions could have extremely serious consequences for those affected.

38. A significant proportion of *Cart* JRs relate to immigration claims.[51] Almost all the cases in the Immigration and Asylum Chamber of the First-tier Tribunal relate to asylum and human rights appeals, which engage the most fundamental rights, including in some cases the difference between life and death.[52] This can be seen by the 57 real case studies of successful *Cart* JRs provided by the Immigration Law Practitioners' Association (ILPA) in response to the Consultation, as well as the 10 cases identified by IRAL.[53] Each case involved a person's fundamental rights and the UT incorrectly applying the law in refusing to grant permission to appeal. The examples provided by ILPA include parents' applications for their child to be reunited with them, a child's application to remain in the UK to receive life-saving treatment, the asylum claim of a victim of human trafficking and Female Genital Mutilation, and many other deportation and asylum decisions where, if deported individuals faced persecution, their lives were at risk and/or they would be separated from their families. Under Clause 2, this crucial and focused review will be lost, and with it the potential for fundamental injustices to be prevented.

39. It is important to remember that *Cart* JRs apply to all permission decisions of the UT – not just in the immigration context. For instance, in the Administrative Appeals Chamber many of the appeals relate to access to benefits, which can be the difference between whether an individual and their family face destitution and homelessness. In one of the first reported *Cart* JR cases, the High Court found that the First-tier Tribunal had failed to consider a significant witness statement which could have vitiated its decision upholding findings of misconduct against a mental health nurse, which had resulted in the nurse's inclusion on the Protection of Children Act list and the Protection of

[50] Consultation, n. 9 above, para. 52.

[51] 5,870 judicial review applications since 2012 are labelled "Cart – immigration" in the Ministry of Justice data on civil justice and judicial review for 2020. 423 judicial review applications are labelled "Cart – other". Civil justice statistics quarterly: October to December 2020, Civil Justice and Judicial Review data file.

[52] As Lord Dyson recognised in *Cart,* no.3, at [112], "In asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture."

[53] ILPA, 'ILPA's response to the government's consultation on Judicial Review Reform' (April 2021).

Vulnerable Adults scheme– thus terminating her career as a nurse.[54]

'Third bite at the cherry' and the UT's role

40. ***Cart* JRs are not about having a 'third bite at the cherry.'** There is also an important wider public interest at stake. *Cart* JRs prevent the UT from becoming insulated from review, by ensuring that there is a means by which errors of law, which could have very significant and ongoing impacts across the tribunal system, can be identified and corrected. As Lord Philips said, *Cart* JRs "*guard against the risk that errors of law of real significance slip through the system*".[55] UT judges are specialists in their field, however as Lady Hale recognised "*no-one is infallible*".[56] *Cart* JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within the tribunals system,[57] with the UT continuing to follow erroneous precedent that itself, or a higher court has set.

41. The *Cart* JR cases that succeed will involve either (i) an important point of principle or practice, which would not otherwise be considered; or (ii) some other compelling reason, such as a wholesale collapse of fair procedure.[58] These are the second-tier appeals conditions that were set as a threshold by the Supreme Court in *Cart,* and are now in the Civil Procedure Rules, for a *Cart* JR to be considered.[59] The Supreme Court sought to address the most significant injustices while making efficient use of judicial resources. It was in fact the Supreme Court's intention that few *Cart* JRs would be successful, but those that were would be the most egregious and important cases with serious errors of law.

42. Due to the second-tier appeals conditions, *Cart* JRs involve only the most serious errors of law. If a *Cart* JR is successful, it will mean that the applicant had not been given a lawful "proper first bite of the cherry"[60] in appealing a decision to the FTT, and the UT had unlawfully refused permission to appeal the unlawfulness. *Cart* JRs also do not in any way determine the claimant's substantive case, or whether the claimant should be

[54] *R. (on the application of Kuteh) v Upper Tribunal* [2012] EWHC 2196 (Admin).

[55] *Cart,* no. 3, at [92] (Lord Phillips).

[56] *Ibid*, at [37] (Lady Hale).

[57] *Ibid,* at [43] and [37] (Lady Hale).

[58] CPR 54.7A(7)(b).

[59] As well as requiring an "arguable case, which has a reasonable prospect of success" (CPR 54.7A(7)(a)).

[60] See Public Law Project, 'Judicial Review and Courts Bill, Briefing on House of Commons Committee stage amendments', page 8.

allowed permission to appeal – this is for the UT to decide following a successful *Cart* JR.[61]

43. **It is also wrong and, as described by Lady Hale in *Cart*, a "constitutional solecism" that since Parliament designated the UT as a "superior court of record" Parliament excluded any possibility of judicial review**. The decision in Cart did not involve the interpretation of any statutory provision that could be described as an ouster clause, and statutorily designating a body as a superior court of record, as Laws L.J. pointed out at first instance, "*says nothing on its face about judicial review*".[62]

Proportionate use of resources

Cart JR "success"

44. The Government's Impact Assessment in respect of the Bill concludes that the "success" rate for *Cart* JRs is around 3.4%,[63] which it is worth noting is a highly significant increase (15.5x) from the figure of 0.22% used to initially justify the removal of *Cart* JRs by IRAL.

45. Further, the Government's definition of "success" does not reflect the purpose of *Cart* JRs and is unduly narrow. The Government defines "success" as not only success in the judicial review but also a finding in favour of the claimant at the subsequent substantive appeal in the UT.[64] However, *Cart* JRs have several purposes (see paragraphs 37 to 41), including the identification of errors of law in UT permission decisions where important issues of principle or practice are raised. This will be achieved if the UT's refusal of permission to appeal is quashed. The Impact Assessment states that a total of 92 cases, out of 1249 applications,[65] were remitted to the UT for a

[61] he procedure at CPR 54.7A(9) ensures that, generally, once a judge decides that the second appeals criteria are met and permission is granted, the case will go back to the UT for a reassessment of arguability.

[62] *R (Cart & Ors) v The Upper Tribunal* [2009] EWHC 3052 (Admin) at [29]. It is also worth noting that the Parliamentary Election Court is amenable to judicial review, despite being designated as a superior court of record (see *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin)). Likewise, the Crown Court in England and Wales, which shares similar characteristics as the UT, including being designated as a superior court of record, is subject to full judicial review, save were expressly excluded by statute. See further, Case for the Intervener JUSTICE, in *R (Cart) v Upper Tribunal* UKSC 2010/0176 and *Eba v Advocate General* UKSC 2010/0206 (2011), available at: https://justice.org.uk/cart-v-upper-tribunal-eba-v-advocate-general/.

[63] The Government conducted its own statistical analysis following strong criticism of IRAL's analysis, which seriously misrepresented the IRAL's statistical findings, had methodological flaws and did not represent the range of "positive results" for claimants, including settlements (as is recognised by the Government, Impact Assessment, paras. 59 – 60). See, 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 (March 2021), JUSTICE response to the Consultation, n.2 above, paras. 24 to 29.

[64] 'Judicial Review and Courts Bill: Judicial Review Reform, Impact Assessment', para. 62.

[65] *Ibid*, para. 74.

permission to appeal decision, in the context of immigration *Cart* JRs for 2018 to 2019[66] (minus cases pending an appeal decision in the UT). Therefore, based on these figures and a more accurate definition of "success", which still does not account for settlement, the "success rate" is **7.37%** – more than double the 3.4% relied upon by the Government and more than 30 times the 0.22% relied upon by IRAL.

The costs argument

46. The costs of Cart JRs are described as a "*disproportionate and unjustified burden*" on the system.[67] The Impact Assessment estimates that between 173 to 180 High Court and UT sitting days will be freed up each year by Clause 2, representing savings of between £364,000 to £402,000 a year. This figure is not high at all – especially when considering the important role of *Cart* JRs in preventing serious injustice and in ensuring key decisions of the UT are not insulated from challenge. By comparison, the Government Legal Department's total administration costs from 202-2021 was £226.7m[68] (564 times larger than the upper estimate for yearly *Cart* JR costs).

47. This figure is also inflated since it considers the costs of the UT rehearing the case, which will occur because an unlawful UT permission decision has been identified by the High Court. To include these costs in the Impact Assessment is to include savings that result from allowing unlawful decisions to stand. This position cannot be acceptable.[69] Further, the average number of hours per *Cart* JR in the High Court that the Impact Assessment provides for is 1.3 hours, or five *Cart* JRs per day.[70] This could easily be overestimating the time it takes a High Court judge to consider a single *Cart* JR case. This is especially since there is a specific streamlined procedure for *Cart* JRs, including that if permission for the *Cart* JR is granted, unless a substantive hearing on the *Cart* JR is requested, the court will automatically quash the UT's refusal of permission.[71]

[66] Which the Impact Assessment determines to be the relevant years and are used for the figure of 3.4%.

[67] Judicial Review Reform Consultation, The Government Response, para. 37.

[68] Government Legal Department Annual Report and Accounts 2020 – 21, page 25.

[69] See further on this PLP, Judicial Review and Courts Bill, PLP Briefing for House of Commons Second Reading, para. 23.

[70] Working back from the numbers provided (150 day saving for the High Court, 6.5 hours per day and an average 750 case load per year

[71] CPR 54.7A(9) and 5A.7A(10). The approximations of time taken to review a Cart JR in the High Court is based on a time and motion study conducted by Lord Justice Briggs in 2016. However, as the Impact Assessment recognises this study did not focus on a specific court level or case type.