NORTHERN IRELAND HUMAN RIGHTS COMMISSION

House of Commons Public Bill Committee
Houses of Parliament
London
SW1A 0AA
United Kingdom

By email to: scrutiny@parliament.uk

23 November 2021

FAO: The Public Bill committee

Re: Judicial Review and Courts Bill 2021-22

The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the following advice is submitted to the House of Commons Public Bill Committee (the Committee) in respect of its call for evidence on the Judicial Review and Courts Bill 2021-22.

The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);[1]

[1] Ratified by the UK in 1951.

- UN International Covenant on Civil and Political Rights (UN ICCPR);[2]

The NIHRC welcomes the opportunity to respond to the Committee and seeks to highlight the effect the proposed Bill may have on the UK's human rights legal obligations. The Commission understands that whilst the Bill's application in the jurisdiction of NI may be limited, Clause 46 of the Bill provides that it has UK wide extent.

In addition to the wider UK access to justice implications, the Commission is concerned about provisions that will have a profound effect in NI. The Commission will focus its response, at this instance, to Clauses 1 and 2 of the Bill; effect of and access to judicial review.

International Human Rights Standards

Judicial review is one part of what is necessary for the state's obligation to provide an effective remedy to those seeking to challenge a state's actions, either in legislation or executive decision, and have such decisions scrutinised by judicial authorities.

We appreciate that an effective remedy can take various forms. It is not limited to judicial review but it is particularly important where the right at issue derives from international human rights treaties.

Many of those treaties contain their own provisions about remedy.

A vivid example of this is the International Covenant on Civil and Political Rights (ICCPR) where the right to an effective remedy is derived from Article 2(3) which states:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

[2] UK ratification 1976

> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This has been expanded upon by the UN Human Rights Committee General Comment 31 on Article 2. Here the Human Rights Committee has underlined that:

> States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies.[3]

General Comment 31 expands on this principle further and goes on to state that:

> The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies… Cessation of an ongoing violation is an essential element of the right to an effective remedy…
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> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been

[3] CCPR/C/21/Rev.1/Add. 13, 'Human Rights Committee, General Comment No. 31, Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, para 8

> violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.[4]

There is an obligation in international law to ensure citizens have access to an effective remedy, should the actions of the state violate the law and the rights of its citizens.

The reforms proposed in the Judicial Review and Courts Bill will impact and undermine the discharge of that obligation.

European Convention on Human Rights

The ECHR places an obligation on states to provide effective remedies for violations of the Convention. Article 13 ECHR provides:

> Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Whilst Article 13 of the ECHR has not been incorporated into UK domestic law via the Human Rights Act 1998, and so is not directly enforceable, the UK is nevertheless a party to the ECHR and is obliged to respect and implement that right, taking account of case law of the European Court of Human Rights (ECtHR).

The interpretation of Article 13 has been developed by the ECtHR. In *Rotaru v. Romania*, the ECtHR held that Article 13 ECHR guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order.[5] In the case of

[4] Ibid, at paras 15-16.
[5] *Rotaru v. Romania*, no. 28341/95, ECHR 2000, at para 67.

Ramirez Sanchez v. France, it was held that a new remedy stemming from a change in the case-law did not have retrospective effect and could not have any bearing on the applicant's position; it could not therefore be regarded as effective.[6] The ECtHR found a violation of Article 13 ECHR, alongside Article 3 ECHR, on account of the lack of a remedy in domestic law that would have allowed the applicant to challenge the decisions to prolong his solitary confinement.

The ECtHR has also found that the right to the execution of judicial decisions is of yet greater importance in administrative proceedings.[7] In summary, it held that by applying for a judicial review on administrative issues, in the highest courts of the state, the litigant will no doubt be seeking not only annulment of the impugned decision of a public body, but also and perhaps more pertinently, the removal of its practical effect on them. The effective protection of the applicant and the restoration of legality set a self-evident obligation on the authorities' part to comply with the judgment and this principle has been upheld by the ECtHR.[8] Thus, while some delay in the execution of a court judgment may be justified in some particular circumstances, the ECtHR has held that the delay may not be such as to impair the litigant's right to enforcement of that judgment.[9]

The purpose is to safeguard rights, so that their enjoyment is practical and effective. Specifically, this means the right to redress and remedy should Convention rights be violated by state action. To this end the scope of judicial scrutiny by a domestic court must be sufficient to guarantee protection under Article 13 ECHR; insufficient powers of judicial review may entail a violation of Article 13 ECHR.[10] Any attempt therefore to restrict redress in judicial review, either by suspension orders or by limitation of retrospective redress, is in violation of the state's obligations.

The ECtHR has also found that restrictions in access to judicial oversight of individual decisions may engage Article 13 ECHR. In the

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[6] *Ramirez Sanchez v. France*, no. 59450/00, ECHR 2006, at paras 165-166.
[7] *Sharxhi and Others v. Albania*, no. 10613/16, ECHR 2018, at para 92.
[8] *Hornsby v. Greece*, no. 18357/91, ECHR 1997, at para 41; *Kyrtatos v. Greece*, no. 41666/98, ECHR 2003, at paras 31-32.
[9] *Burdov v. Russia*, no. 59498/00, ECHR 2002, at paras 35-37;
[10] *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999, at paras 136-139; *Hatton and Others v. the United Kingdom*, no. 36022/97, ECHR 2003, at paras 141-142.

case of *Musa and Others v. Bulgaria*, the Court found a violation of Article 13 ECHR, alongside Article 8 ECHR, as regards the inability to seek judicial review of an order withdrawing a residence permit on national security grounds.[11]

Similarly, in *Metin Turan v. Turkey*, the absence of remedy by which to challenge a decision by a governor to transfer a civil servant to a town in another region, on account of his being a member of a legally founded union, was a violation of Article 13 alongside Article 11 ECHR.[12] It was held that the lack of access to judicial review in respect of the transfer did not afford sufficient safeguards in order to avoid any abuse or to allow a review of lawfulness. It is likely on that basis that any attempt to restrict scrutiny of a decision of an upper tribunal would be in violation of the state's obligations under Article 13 ECHR.

Clause 1 (Quashing Orders)

A quashing order is an order issued by a court that nullifies an unlawful decision or action. It provides an effective remedy by invalidating unlawful actions, such as executive or administrative decisions or secondary legislation. Clause 1 of this Bill amends the power of courts to suspend a quashing order or limit or remove its retrospective effects.

The NIHRC is concerned at the proposal for prospective-only relief as, if a court were to avail of this power, it would mean that previous unlawful decisions and acts could continue to be considered valid. Any previous uses of the decision, despite it being found to be unlawful, would be upheld. In a perverse scenario, a prospective only quashing order could lead to an applicant who has successfully pursued a judicial review being unable to benefit from that decision.

Even if a prospective-only quashing order is not used in a particular case, its mere availability could serve as a disincentive to applicants coming forward to pursue a judicial review. If the applicant could potentially have no material benefit from taking the risks involved in

[11] *Musa and Others v. Bulgaria*, no. 61259/00, ECHR 2007, at paras 70-73.
[12] *Metin Turan v. Turkey*, no. 20868/02, ECHR 2006, at paras 36-38.

judicial proceedings, then they may be deterred making meritorious claims. Judicial review is the main mechanism for challenges to government decisions under the Human Rights Act, so discouraging potential applicants from taking judicial challenges against could potentially have a negative effect on the judicial scrutiny of important human rights issues in the UK.

The most effective decision-making and robust legislation are those which are tempered by and subject to rigorous scrutiny. The proposal in the Bill to introduce prospective only quashing orders could therefore lead to poor decision making and unlawful actions by public bodies going unchallenged and unremedied. A fundamental purpose of judicial review in ensuring good decision-making by public authorities and compliance with the law would be weakened and a vital check against executive overreach undermined.

The existence of prospective-only relief could also negatively affect citizens' access to justice and so potentially engage a right under Article 6 ECHR, particularly if shortcomings in the legal aid system deprive individuals of the "practical and effective" access to a court to which they are entitled.[13]. This is because a further financial hurdle could be placed in front of potential claimants as legal aid would likely become even harder to obtain for judicial review cases should prospective-only remedies be introduced as applicants for legal aid must be able to demonstrate that there would be a tangible benefit were they to be successful.

The NIHRC opposes the introduction of prospective-only quashing orders which will undermine the UK's international human rights obligations by denying an effective remedy to those affected by unlawful acts of government. The NIHRC recommends that the provision in clause 1 to enable the removal or limitation of any retrospective effect of a quashing order be removed from the Bill.

Clause 1 also creates a power for the courts to suspend a quashing order so that it will not take effect until a future date. The stated

[13] *Staroszczyk v. Poland* (no. 59519/00),at para 135; *Siałkowska v. Poland* (no. 8932/05), at para 114.

purpose of allowing a suspension on the application of the quashing order would be to provide time for the public authority in question to amend or replace the impugned decision or act before it is quashed.

The NIHRC does not see an issue, in principle, of introducing an option for the courts to suspend quashing orders, which we believe would provide benefits through greater remedial flexibility. Suspended quashing orders, if used correctly and prudently, could avoid the immediate administrative chaos of quashed decisions and provide a solution that would allow public bodies to take steps to minimise disruption. A suspended quashing order would still need to come into effect after a reasonable period of time so as to provide remedy to the applicant.

However, a suspended quashing order allows for an unlawful decision to remain temporarily in place and does not provide an immediate remedy to the applicant and others affected by the decision or act at that point. The applicant in the case may have already spent a considerable period of time being affected by this decision even before beginning what often can be lengthy legal proceedings. Coupled with the power to remove any retrospective effect of its ruling, there is a concern that this could result in a scenario where a successful applicant comes away empty handed, whilst others potentially benefit.

The Commission is concerned at the legislative presumption to make a suspended order if it would "offer adequate redress". Suspended quashing orders, to the extent that they may interfere with an applicant's Article 13 ECHR right, should remain at the discretion of the judiciary where they determine that suspension would satisfy a proportionate and legitimate aim.

The NIHRC is not opposed, in principle, to introducing the power to suspend quashing orders as part of a move toward greater remedial flexibility. The NIHRC is however opposed to the statutory presumption in favour of suspending a quashing order or limiting or removing its retrospective effect. Such a presumption would weaken judicial discretion and could lead

to inappropriate remedies being applied. It may also lead to a further delay in the application of justice to an applicant who may have already suffered significant delay by operation of the judicial process.

The NIHRC recommends an amendment to remove the presumption in favour of a suspended or prospective-only a quashing order, so they can only be used where the court is convinced that it would provide an effective remedy for applicants.

Clause 2 – Ouster clauses

Clause 2 of the Bill seeks to remove the availability of judicial review of decisions of the Upper Tribunal, so-called *Cart* judicial reviews. The explanatory notes suggest this because the success rate is very low, with latest figures in the region of 3.4 per cent. We note however that this figure could be higher.[14] The government suggests that senior judicial time could be better utilised in reviewing other cases and contributing to overall efficiency of the courts and justice system.[15]

Even if the success rate is as low as stated, the NIHRC is concerned that an injustice anywhere is a risk to justice everywhere. This is particularly relevant in the context of NI. Clause 46 of the Bill, which sets out legislative extent, means that Clause 2 will have the greatest application in the jurisdiction of NI, in cases before Immigration Tribunals.

These cases deal with applicants who are already vulnerable and at risk. They regularly raise issues of ECHR rights. The stakes for applicants in these tribunals are high, particularly those seeking asylum, who might be at risk of discrimination, torture and even death if their appeal is decided incorrectly. The lack of judicial oversight in these cases engages Article 13 ECHR and, as we have already identified, the ECtHR has found that the inability to seek

[14] Law Society of England & Wales - Parliamentary Briefing on the Judicial Review and Courts Bill House of Commons, second reading, 18 October 2021.
[15] Judicial Review Reform Consultation: The Government Response, July 2021, CP 477 at para 37

judicial review of an order withdrawing a residence permit was a violation of Article 13 alongside Article 8.[16]

The NIHRC also considers there to be a risk that clause 2 will provide a template for the further introduction of ouster clauses to remove the courts' ability to judicially review certain types of executive action, reduce legal accountability and prevent individuals who have been adversely affected from being able to secure an effective remedy.

The NIHRC opposes the introduction of ouster clauses and the proposals to remove the ability to judicially review decisions of the Upper Tribunal in permission to appeal cases. We recommend an amendment to remove clause 2 from the Bill or at the least remove its application to the NI jurisdiction in its entirety as courts and justice are a devolved matter and should be decided by the devolved government of NI.

The Commission is available to make further submissions on this Bill, if required.

Yours sincerely,

Alyson Kilpatrick
Chief Commissioner

[16] *Musa and Others v. Bulgaria*, no. 61259/00, ECHR 2007, at paras 70-73.