Judicial Review and Courts Bill

(Part 1 – Judicial Review)

House of Lords Second Reading

Briefing

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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 Second Reading in the House of Lords on 7 February 2022. This briefing addresses Part 1 of the Bill, which relates to judicial review. Further detail can be found in JUSTICE's previous briefings for the Bill's stages in the House of Commons.[1]

3. 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.

   - Clause 1 (s. 29A(1)(b)) introduces prospective-only remedies in judicial review. This 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**.

   - Where a prospective only remedy is granted, clause 1 requires that unlawful measures are treated as if they were lawful up until the order is made. This means individuals will not be able to rely on their unlawfulness in other contexts, for example as a defence to criminal proceedings. **If prospective only remedies are to be introduced, third-parties' rights and defences which rely on the unlawfulness of a measure must be protected.**

   - 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.**

[1] https://justice.org.uk/judicial-review-and-courts-bill/.

- 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 becoming the default. Further, s.29A(10) favours the assurances of the executive over other important considerations, including the potentially severe impact of the new remedies on claimants and third parties. **S.29A(9) and s.29A(10) should therefore be removed.**

- If the presumption is not removed, it should be amended so that **the new remedial powers can only be exercised if they offer an effective remedy to the claimant and any other person materially affected by the impugned act**; and

- Clause 2 would severely restrict *Cart*[2] 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. **Clause 2 should therefore be removed.**

Quashing Orders – Part 1, Clause 1

4. 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 when a court finds that a public body acted unlawfully: (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 the court order onwards (s.29A(1)(b) (we refer to these as prospective only quashing orders ("POQOs")). Ordinarily a quashing order nullifies or invalidates the unlawful measure and the measure's consequences must be "unwound."

5. The Government has proposed extending the provisions of Clause 1 to all proceedings where secondary legislation is challenged as being incompatible with the Human Rights Act 1998 (or a new bill of rights).[3] We are concerned that Clause 1 will be used as a model for remedies beyond judicial review and in situations involving serious breaches of human rights. It is vital that the concerns with the clause are addressed now.

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

[3] Ministy of Justice, Human Rights Act Reform Consultation, question 16, para. 252.

Prospective only quashing orders (POQOs)

6. **JUSTICE is opposed to POQOs.** POQOs were not recommended by IRAL, nor do they build on the IRAL panel's narrow recommendations, which related to suspended quashing orders.[4] In issuing a POQO, the courts will be determining that an unlawful measure should be treated as if it were lawful in the past.[5] This goes directly against the rule of law and could significantly undermine the effectiveness of judicial review to the detriment of individuals' rights and the accountability of government.

    a. **POQOs deny redress to those impacted by unlawful government action, including the claimants and others who have suffered loss. This will result in unjust outcomes and weakens the protection of citizens against abuse of power.** As the Government has acknowledged 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*."[6] This may also **breach the requirement for an effective remedy for breaches of the European Convention on Human Rights (ECHR), as provided for in Article 13 ECHR**.

    By way of example, in 2018 the High Court declared the decision of the Home Office to cut weekly benefits to asylum seeking victims of trafficking by over 40% - from £65 to £37.75 per week - to be unlawful. The judge also held that the claimants and anyone else subjected to the cut be entitled to backdated payments.[7] However, if the court had ordered a POQO, the claimant, and thousands of other highly vulnerable victims of trafficking who had suffered significant hardship due to the reduced funds, would not be entitled to any backdated payments.[8]

    b. **POQOs arbitrarily distinguish between people who have been impacted by the unlawful measure before and after a court judgment**. As the Joint

[4] As Jermey Wright recognised at the second reading of the Bill, House of Commons, Volume 702, Column 212.

[5] 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.

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

[7] *K, AM v Secretary of State for the Home* Department [2018] EWHC 2951 (Admin).

[8] For further examples if where the application of Clause 1 could have created significantly unjust outcomes for the claimants and others see Public Law Project, Judicial Review and Courts Bill, Case Studies – Clause 1.

Committee on Human Rights ("JCHR") has said that *"It would be unjust for potentially large numbers of people who have been impacted by an unlawful decision or measure to be denied a remedy simply because of the point at which they were impacted*. *Those affected before the court's decision are just as entitled to the law's protection as people who may be affected by an unlawful decision or measure in the future*."[9] We fully agree.

For instance, in 2017 the High Court found that a Home Office policy to remove EU rough sleepers was unlawful and discriminatory. The policy was quashed.[10] If a POQO had been ordered, any homeless EU citizen who had already faced removal action or who already had a removal notice issued against them, would still have faced deportation – only those potentially receiving a removal notice in the future would be protected.

c. **POQOs allow the executive to act unchecked, safe in the knowledge that the implications of acting unlawfully would be limited**. 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*".[11] The Lord Chancellor has said that the reforms will lead to *"a better outcome, allowing both essential judicial accountability and good governance at the same time; those two aspects can and should go hand in hand*". However judicial accountability and good governance already go "hand in hand". Reducing judicial accountability for public bodies to act lawfully risks jeopardising good governance, rather than improving it.

For example, during Covid-19, changes introduced by the government which 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.[12] The possibility of a POQO being issued would have reduced further any incentive on the Government to ensure that its initial decision was lawful, since a POQO would in effect mean that the standards would have been deemed lawful up to the date of the court's

[9] JCHR, Legislative Scrutiny: Judicial Review and Courts Bill, Tenth Report of Session 2021-2022, para. 26.

[10] *R (Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

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

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

decision. There would therefore be no negative consequences for the Government for unlawfully reducing the standard of care for that period up to the court order.

d. **POQOs remove a key motivation to bring a judicial review – to reverse the consequences for the claimant of the unlawful measure. This will likely have a chilling effect on judicial review**. As the JCHR has said "*judicial review claimants already face significant obstacles when seeking justice, and it is unfair and unreasonable to introduce changes that could further dissuade them from bringing unlawful action by public authorities before the court*."[13] POQOs may also prevent claimants from securing legal aid, which requires there to be "sufficient benefit" to the individual of the advice and representation.[14]

e. **POQOs introduce serious legal and practical certainty.** The transition between a measure being valid and then quashed going forward will be difficult and unwieldy to navigate, including for public bodies. For example, what would happen to ongoing criminal proceedings in respect of a regulation found to be unlawful but quashed only prospectively?

f. POQOs risk important and difficult social policy and economic issues, which require and deserve Parliament's attention, being decided by the courts.[15] As Professor Tom Hickman QC has pointed out, POQOs allow the courts to in effect "re-write the law retrospectively".[16]

7. In short, as well as undermining judicial accountability and good governance, POQOs risk leaving claimants and others continuing to suffer the consequences of unlawful measures. It is not clear how this can be described as a "*better*"[17] or "*successful*".[18]

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[13] JCHR, no.9 above, para. 24.

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

[15] See further, Jeremy Wright, House of Commons, Volume 702, Column 212: "*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.*"

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

[17] Dominic Raab, House of Commons, Volume 702, Column 192

[18] James Cartlidge, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 130

8. **The courts already have considerable flexibility with remedies** to address circumstances where, despite the concerns set out above, a quashing order would not be appropriate.[19] The courts will frequently consider the impact of quashing on third parties, certainty and *"the needs of good public administration*"[20], often declining to issue a quashing order and issuing a declaration instead.[21]

9. A declaration of unlawfulness does not quash the measure in question, and therefore avoids the concerns about the impact on administration. However, the unlawfulness of the measure is still recognised, both retrospectively and prospectively, so the claimant and others in similar circumstances can rely on the unlawfulness to obtain a remedy or defend themselves in other proceedings (see further paragraphs 12 to **Error! Reference source not found.** below). This provides the public body with the necessary flexibility in how it addresses the consequences of the unlawful measure, while providing protections to those impacted.

10. The government has repeatedly referred to the case of Natural England revoking unlawful gun licenses due to a threatened judicial review, which caused considerable uncertainty for farmers who required the licences, as an example of the sort of uncertainty Clause 1 will avoid. The Government says that Clause 1 would have provided Natural England with the confidence to contest the threatened judicial review without fear of a quashing order were the licences to be found unlawful.

11. It is unclear why the Government is encouraging unnecessary litigation. If a public body realises that it has acted unlawfully, it should be encouraged to seek to remedy this, considering third parties who have relied on its actions – not hold firm and fight it out in court. Further, it is unlikely that Natural England would have wanted to go through costly litigation (even if POQOs were available) to defend licences that it had realised were unlawful. The uncertainty that arose for farmers was not a consequence of the judicial review remedies, but of Natural England enacting an unlawful measure, withdrawing it in haste and then not issuing replacement licences. Even if the case had gone to court, given the farmers' interests it is highly unlikely that a full retrospective quashing order

[19] See further, JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021), paras. 45 – 50.

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

[21] Research by PLP has in fact shown that in challenges to statutory instruments, a declaration, rather than a quashing order, is the most common remedy following a successful judicial review. See, https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf.

would have been issued - a simple declaration of unlawfulness being more likely.

Erasure of defences and private law rights based on the unlawfulness of a measure

12. Under s.29A(5), where a new remedy is ordered, individuals' will not be able to defend themselves against unlawful measures, e.g. in criminal proceedings, or exercise their private law rights in relation to an unlawful measure, e.g. bring claims for compensation. This goes directly gains the ordinary position, where, if a court has found a measure unlawful, even if it has not been quashed, it is possible for others to rely on this finding of unlawfulness in criminal and civil proceedings. As IRAL stated this would leave the law in a "*radically defective state*"[22] and risks significant unfairness. For instance:

    - an individual could find themselves being prosecuted or continuing to have a criminal record under an unlawful statutory instrument,
    - a person who has had to pay a tax under unlawful regulations, would not be able to bring a claim against HMRC to be refunded the money,[23]
    - an individual who has paid a penalty notice for a traffic offence under an unlawful byelaw would not be able to get a refund. If that person refused to pay and was subject to, or in the process of being subject to, prosecution and a fine (which can be in the £1,000s) in the magistrates' court, they would have no defence or recourse,
    - individuals who have suffered mistreatment due to unlawful actions would not be able to bring a claim for compensation, for instance for unlawful imprisonment, and
    - individuals found ineligible for a welfare benefit under unlawful eligibility regulations would not receive back payments of the benefit. They would likely have to make a new application and wait for another decision to be made to receive the correct entitlement going forward.

13. We recognise that the interests of those who would benefit from the quashing is one of the s.29A(8) factors that the courts must consider, and that under s.29A(2) the court could add conditions to protect third parties' rights and defences. However, this does not provide anywhere near sufficient protection for third parties. It cannot ever be justifiable

[22] IRAL Report, para. 3.66.

[23] 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.

for an individual to face the loss of their liberty or a penalty on the basis of an unlawful measure. This gap in protection needs to be remedied.

14. It is also completely unrealistic to expect a court to envisage all the potential third parties and groups of individuals who may be negatively affected by an unlawful measure being treated as lawful. The Government has raised the wide-ranging effects of public body decision making as a reason why the retrospective quashing of a measure should be avoided, but it is this wide-ranging effect that means that the impact on third parties of issuing one of the new remedies could be so difficult to predict. This is especially since the public body defendant has no obligation, or incentive, to consider and bring the potential risks to third parties to the court's attention.

Proposed executive actions - s.29A(8)(e)

15. Proposed new s.29A(8) lists factors that the court must take into account when deciding whether to order one of the new remedies. Section 29A(8)(e) requires the courts to consider any action "*proposed to be taken*" by a responsible body. This is incredibly vague. It 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 – continuing to be detrimentally impacted – with limited, if any, legal recourse.

16. **JUSTICE considers the words "or proposed to be taken" must be removed from s.29A(8)(e).** This would not prevent the courts from looking forward but limits it to where the public body has given an undertaking that it will carry out the proposed future acts, helping provide certainty and legal recourse if the undertaking is not followed.

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

Section 29A(9)

17. **JUSTICE is opposed to the presumption in favour of the new remedies at s.29A(9)**. This clause, which was not recommended by IRAL, unnecessarily fetters remedial discretion, is convoluted and risks excessive litigation, and creates a "default" position that the new remedies should be applied.

18. The presumption directly conflicts with the Government's stated aim of increasing the courts' flexibility by requiring particular remedies to be used in certain circumstances. The Government continues to reiterate the importance of the courts having the discretion to issue the new remedies as "*they see fit and proper*"[24], but the courts freedom to do so is jeopardised by the inclusion of a presumption.

19. The Government states that s.29A(9) can provide "*a clear message that Parliament expects to see the new powers used where appropriate*."[25] However, the courts already use the most appropriate remedy for the circumstances of the case before them. A court, with its experience, will issue a POQO / SQO if it is the most appropriate remedy. Not only does it display a lack of trust in the judiciary to have the presumption, but it risks preventing the courts from being able to provide the most appropriate remedy.

20. Nor is a presumption required to "*encourage[e] and expedit[e] the accumulation of jurisprudence*"[26] or for the courts to "*state the reasons, whether they do or do not*" [27] use the new remedies. The courts will, as they do with any legislation, build up jurisprudence as they consider the new remedies, including providing reasons for their decisions.

21. The Government has recognised that *"removing the presumption from the Bill would not necessarily prevent the new modifications to quashing orders from operating effectively*".[28] However, instead its inclusion will not only reduce remedial flexibility, but is likely to increase the length and costs of judicial review – for courts, public bodies and claimants – by encouraging further arguments and submissions at the remedy stage. This is particularly so in light of the convoluted drafting and multiple stages to the presumption.

Section 29A(10)

22. **The presumption is made worse by the inclusion of s.29A(10), which JUSTICE opposes.** This provision directs the court to give special consideration to anything which the public body with responsibility for the impugned act had done or says it will do. The

[24] Caroline Johnson, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 106; James Cartlidge page 144, 145: *"On the question of whether they should be used, of course that is a discretionary matter."*

[25] James Cartlidge, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 127.

[26] *Ibid* page 113.

[27] *Ibid*, page 144.

[28] *Ibid*, page 127.

public body with responsibility may not even be party to the litigation.

23. There are significant difficulties with making a POQO or SQO on the basis of statements made, or even undertakings given, by another body. First, only the claimant would be able to enforce the undertaking or statement, even though others will also be impacted by the body's non-compliance. Second, claimants may not have the funds, ability, or resources to bring the case back to court. Third, the recourse would only be against the defendant public body not any other public bodies who have said they would act. Fourth, the Government has recognised the practical difficulties and potential for further protracted litigation that could arise in deciding whether a condition in an order has been complied with[29] – the same concerns apply equally to court orders made on the basis of public body assurances.

24. The new remedies could have a significant impact in denying redress to those impacted by an unlawful measure – ordering them based on public bodies' assurances not only risks uncertainty but also the further denial of redress. For example, where someone has been deemed ineligible for a welfare benefit under regulations subsequently found unlawful, the court may order a POQO on the basis of Government assurances that a mechanism for ensuring back payments will 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.

25. The courts already take into account steps that the executive or Parliament are intending to take[30] or have taken[31] (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.[32] However, it should be for the courts to determine in the circumstances of the case what weight should be given to public body assurances, rather than being required to preference these assurances at the expense of the claimant and others. As the JCHR has

[29] 'Judicial Review Reform Consultation, The Government Response, no.**Error! Bookmark not defined.** above, para. 68.

[30] 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.

[31] The courts will exercise their discretion to not provide a remedy if events have overtaken the proceedings, *R. v Sunderland Juvenile Court Ex p. G* [1988] 1 W.L.R. 398.

[32] *R (Langton) v Secretary of State for Environment and others* [2019] EWHC 597 (Admin) at [130].

concluded "*Clause 1 appears to be an attempt to weight the scales in favour of the defendant public authority over the claimant."*[33] Such an intrusion cannot be acceptable.

Precondition of an effective remedy

26. The presumption requires the new remedies to be used where they offer "*adequate redress"*, but, as has been recognised by the JCHR, Clause 1 does not prevent the courts using the new remedies in situations where their use would not offer "*adequate redress"* for the claimant or others impacted by the unlawful measure.[34]

27. This is particularly concerning in light of the factors which the court must consider in s.29A(8). Whilst s.29A(8)(c) requires the courts to have regard to "*the interests or expectations of persons who would benefit from the quashing of the impugned act*", this does not, as the Government claims, provide sufficient assurance that there will be adequate redress for those impacted by the unlawful measure. This fails to recognise that: (a) by definition a POQO will not provide a claimant and others impacted by an unlawful measure any form of "effective remedy" (see paragraph 6.a above), and (b) the courts are required to consider matters that may run counter to an "effective remedy", for example the impact on good administration and public bodies of a remedy.

The Claimant and any other person materially affected

28. There is a lack of clarity as to whether in considering whether a remedy provides "*adequate redress*" under s.29A(9), the courts should consider all those impacted by the unlawful measure, or just the claimant. Unlike civil litigation, as IRAL recognised, judicial review is not purely about the "*protection of private interests*",[35] it is also about addressing the unlawfulness of administrative action for all those impacted. For instance, a judicial review challenging an unlawful housing allocation policy is both for the applicant, but also all the other individuals who may have been unlawfully refused housing in the past and will be in the future unless the policy is changed. Given that the new remedies could override the rights and defences of third parties who are not represented in court (paragraphs 12 to 14), they must only be ordered if they do in fact provide a remedy for all those impacted by the unlawful measure.

[33] JCHR, no.9 above, para. 29.

[34] JCHR, no.9 above, para. 20.

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

Cart judicial reviews – Part 1, Clause 2

29. 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"). This will jeopardise the tribunal system and increase the risk of serious injustices occurring. **Clause 2 should therefore be removed from the Bill.**

Cart JRs prevent serious injustices

30. As the JCHR has stated "*removing the right to judicially review refusals of permission to appeal in all but the most exceptional circumstances will result in a, statistically small, number of these cases being wrongly decided, and those individuals facing a real risk of serious human rights abuses."*[36] Almost all the cases in the Immigration and Asylum Chamber of the UT relate to asylum and human rights appeals, which engage the most fundamental rights, including in some cases the difference between life and death.[37] A recent statistical study of *Cart* JRs between 2018 and 2020 found that over two-thirds of appeals raised human rights grounds, with 71% of "successful" *Cart* JRs involving human rights.[38]

31. This can be seen by the 57 examples 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.[39] Each case involved a person's fundamental rights and the UT incorrectly applying the law in refusing to grant permission to appeal. The examples 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 decisions where, if removed from the UK individuals faced persecution.

32. It is important to remember that *Cart* JRs apply to all permission decisions of the UT – not just in the immigration context. The tribunal system includes many other areas of law, including tax, property, social security, health, education, social care, and pensions, to list a few. For instance, in the Administrative Appeals Chamber of the UT many of the

[36] JCHR, no.9 above, para. 39.

[37] As Lord Dyson recognised in *Cart,* no.2, 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*."

[38] Mikołaj Barczentewicz 'Cart Judicial Reviews through the Lens of the Upper Tribunal' (October 2021).
[39] ILPA, 'ILPA's response to the government's consultation on Judicial Review Reform' (April 2021).

appeals relate to access to benefits, which can be the difference between whether an individual and their family face destitution and homelessness. As a further example, in one of the first reported *Cart* JR cases, the High Court found that the FTT had failed to consider a significant witness statement which could have vitiated its decision upholding findings of misconduct against a mental health nurse.[40]

Cart JRs are not about having a 'third bite at the cherry.'

33. The Government has repeatedly characterised *Cart* JRs as being a 'third bite at the cherry', however this metaphor is misguided and fails to understand the purpose and nature of *Cart* JRs.

34. **First, there is 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*".[41] UT judges are specialists in their field, however as Lady Hale recognised "*no-one is infallible*".[42] *Cart* JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within a 'closed' tribunals system,[43] with the UT continuing to follow erroneous precedent that itself, or a higher court has set.

35. For instance, in one case a *Cart* JR allowed the tribunal to consider and clarify the law on duress when an applicant for refugee status claims that they should not be regarded as complicit in a crime against humanity due to duress.[44] In an another case, a *Cart* JR ensured that the FTT and UT correctly applied the law to find that a minor who was transported to the UK to work could not be deemed to have come "voluntarily," allowing the applicant to be recognised as a refugee and a child victim of trafficking.[45] This helped ensure that the same mistakes would not be made by the tribunal in respect of future child victims of trafficking.

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

[41] *Cart,* no. 2, at [92] (Lord Phillips).

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

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

[44] *AB (Article 1F(a) – defence - duress) Iran* [2016] UKUT 00376 (IAC). See further, Case Study 14 in ILPA's response to the Government Consultation, no.48 above.

[45] *AA/07281/2014 and CO/2676/2015 ("TO (Nigeria)"* See further, Case Study 48 in ILPA's response to the Government Consultation, no.48 above.

36. It is therefore a misstatement to say that the existence of *Cart* JRs "*undermines the integrity of the two-tier tribunal process*"[46]. In fact, the intention of the Supreme Court in *Cart* was to uphold and strengthen the integrity of the tribunal process by ensuring that legal errors, and their potentially severe consequences, were not duplicated without means of correction by tribunals.

37. **Second, *Cart* JRs do not determine the claimant's substantive case on the merits**, n**or do they determine whether the claimant should be allowed permission to appea**l – this is for the UT to decide following a successful *Cart* JR.[47] During a *Cart* JR the court will be looking at specific serious errors of law (see paragraph 39 below), this is a completely different assessment than that of the FTT (being on the substantive case) and the permission stage of the UT. If a *Cart* JR is successful, it will mean that **the applicant had not been given a lawful "proper first bite of the cherry"**[48] in appealing a decision to the FTT, and the UT had unlawfully refused permission to appeal the unlawfulness.

38. As Anne McLaughlin has explained: "*It could be that the first-tier tribunal failed to consider or misinterpreted the evidence, or that the facts are inconsistent with the decision, but the point is: it happens, mistakes are made and Cart JRs provide a vital safeguard to correct these errors in cases where the stakes can be incredibly high. Rather than this being a "third bite of the cherry", the reality is that the first bite was not even a slither—a mistake was made.*"[49]

39. **Third, any "bite" that *Cart* JRs provide is incredibly limited and is a proportionate way of rectifying only the most serious errors of law** (see paragraphs **Error! Reference source not found.** to 44 below on the limited and proportionate costs of *Cart* JRs). 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.[50] These are the second-tier

[46] Dominic Raab, House of Commons, Volume 702, Column 190.

[47] 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.

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

[49] Anne Mclaughlin, House of Commons, Volume 707, Column 896.

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

appeals conditions that were set as a threshold by the Supreme Court in *Cart,* and are now in the Civil Procedure Rules.[51] 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. *Cart* JRs that succeed are therefore by definition the sort of "*serious and credible cases*" that the Government has said the courts should focus on.[52]

40. **It is also, as described by Lady Hale in *Cart*, a "constitutional solecism", to say 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*".[53] The courts' approach to clauses which are alleged to be ouster clauses is well known to Parliament – only clear and unequivocal wording is acceptable.

Proportionate use of resources

41. It is worth noting that the 0.22% 'success rate', that IRAL used to justify its recommendation to remove *Cart* JRs has been strongly criticised as unfounded and statistically flawed. The Government's Impact Assessment in respect of the Bill concludes that the "success" rate for *Cart* JRs is around 3.4%,[54] around 15.5 times higher. Even still this does not take account of all the successful *Cart* JRs due to the Government's unduly narrow definition of success – i.e. not just success in the judicial

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

[52] Dominic Raab, House of Commons, Volume 702, Column 190.

[53] *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/.

[54] 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.19 above, paras. 24 to 29.

review but also in the subsequent substantive appeal.[55] However, Cart JRs have several purposes, 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, regardless of whether the substantive appeal is then successful. Using a more accurate definition of success the 'success rate' is 7.37%.[56] There will also be additional 'successful' cases which are resolved before permission to appeal is granted, for example by a promise from the Home Office that the challenged initial decision will be reconsidered. But this resolution only occurs due to the claimant being able to progress a Cart JR.

42. The costs of Cart JRs are described as a "*disproportionate and unjustified burden*" on the system.[57] 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 2020-2021 was £226.7m[58] (564 times larger than the upper estimate for yearly *Cart* JR costs).

43. 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.[59]

44. 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. 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 is granted, unless a substantive hearing is requested, the court will

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

[56] The Impact Assessment states that a total of 92 cases, out of 1249 applications were remitted to the UT for a permission to appeal decision, in the context of immigration Cart JRs for 2018 to 2019 (minus cases pending an appeal decision in the UT).

[57] Judicial Review Reform Consultation, The Government Response, no.**Error! Bookmark not defined.** above para. 37.

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

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

automatically quash the UT's refusal of permission.[60]

Natural justice exception

45. The potential for Clause 2 to result in serious injustices has been worsened by a government amendment to Clause 2 adopted at report stage in the House of Commons. This narrows the already very restricted exceptions to the removal of *Cart* JRs.

46. Under Clause 2 of the Bill as introduced, the ouster of *Cart* JRs would be subject to certain exceptions, including where the permission "*decision involves or gives rise to any question as to whether…the UT is acting or has acted…in fundamental breach of the principles of natural justice"*. At Report stage this exception was amended so that it would only apply where the UT has acted in a procedurally defective manner that amounts to a fundamental breach of natural justice. **JUSTICE is very concerned about this amendment which is overtly prescriptive, encourages litigation and risks insulating from review breaches of the basic principles of fairness.**

47. The concept of natural justice refers to the basic standards of fairness and effectiveness in decision-making. [61] It is a core doctrine of the UK's common law, rooted in centuries of UK legal tradition, and forming the basis of parties' fundamental rights in decision-making and court proceedings.

48. A procedural defect could amount to a breach of natural justice, but natural justice is a broader concept. Fairness can be both procedural and substantive[62] and the narrowing of the exception risks unduly limiting the breaches of natural justice that can be contested in court. For instance, the tribunal acting in a way that appears biased[63], failing to consider clearly relevant factors[64] or basing its decision upon evidence with no probative value[65] have all been found to be breaches of natural justice under the UK common law. However, there is no clarity as to whether they are necessarily procedural defects.

[60] 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.

[63] *Pinochet (No.3)* [2000] 1 A.C. 119.
[64] *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* [2021] EWHC 2441 (TCC).
[65] *Mahon v Air New Zealand Ltd* [1984] AC 808, 820G-H (Lord Diplock).

49. In fact, limiting judicial review for breaches of natural justice is something which the Government has said *"would be unusual for Parliament"* to do in its Consultation which preceded the Bill:

> The Government believes there is a distinction between (1) excess of jurisdiction (the body didn't have power to do what it did), (2) abuse of jurisdiction (the body breached principles of natural justice) and (3) all other errors, including errors of law. The Government also believes that, at least for quasi-judicial bodies, there is no rule of law issue with removing Judicial Review for (3). The Government thinks it would be unusual for Parliament to do so for (1) and (2). Following *Privacy International*, which involved discussion of such distinctions, the Government is confident the courts will accept the distinction between (1), (2) and (3), despite the possible existence of borderline cases.[66] (emphasis added)

50. The exception introduces an artificial distinction which will lead to uncertainty and additional litigation. The distinction between what amounts to a "procedural defect" and what does not but is still a breach of natural justice cannot be clearly defined. As Lord Mustill set out in *ex parte Doody* "*What fairness demands is dependent on the context of the decision*."[67] The concept of "natural justice" is found across other pieces of legislation,[68] where it is not limited to procedural defects. It is not a fixed concept[69] and seeking to restrict it will undermine the flexibility the courts require to apply to the term to the circumstances of the case before them.

A template for future ouster clauses

51. The Government has been clear that the ouster clause at Clause 2 is to be a template or "*a framework that can be replicated in other legislation*".[70] This is incredibly concerning. As the JCHR has said "*the use of ouster clauses, whatever the case may be for administrative efficiency, raises significant concerns as it directly prevents people being able to vindicate their rights before the courts*."[71] Restricting the review by courts

[70] Ministry of Justice, 'New Bill hands additional tools to judges' (July 2021).
[71] JCHR, Legislative Scrutiny: Judicial Review and Courts Bill, Tenth Report of Session 2021-2022, para. 43.

of the lawfulness of executive action directly undermines the courts' constitutional role to enforce the law as set out by Parliament. It risks the creation of categories of law which Government can breach without consequence, regardless of the impact on individuals. Accepting one ouster clause opens the possibility of many more in yet to be published areas, with consequences across society. However, if the ouster clause is to be passed, it is vital that Parliament proceeds with caution and proper thought is given to how it is structured and the exceptions it allows. Serious injustices should not be unchallengeable under any ouster.

JUSTICE

3 February 2022