

Judicial Review and Courts Bill Fact Sheet (Judicial Review)

Background

- Judicial Review is a mechanism by which the courts can hold the executive and public bodies to account, ensuring that they have exercised their powers properly in accordance with the law. Any person within the UK's jurisdiction can apply to a court for a Judicial Review of a decision by a holder of public authority so long as they have a sufficient interest in the matter. In judging a Judicial Review, the court examines the *process* by which the decision was made and whether the decision maker exercised a power they lawfully had, rather than the *merits or substance* of the decision. If the court finds the decision was unlawful, they may take a range of actions. Usually, this is a quashing order which holds that the decision is and never was of any legal effect. But the court has some other 'remedies' available, such as prohibiting something from happening or making a declaration as to the state of the law. The court can also refuse to give a remedy altogether.
- The UK Government has committed to restoring the balance between Government, Parliament and the Courts. An essential part of this effort is to strengthen Judicial Review, ensuring that it continues to serve justice and good public administration.
- In July 2020, the Independent Review of Administrative Law (IRAL) was launched to examine trends in Judicial Review and consider options for reform. The IRAL Panel, chaired by Lord Faulks QC, ran a Call for Evidence in September and October, the many submissions to which greatly assisted in its analysis. The Panel concluded its work and submitted its Report to the Lord Chancellor in January 2021.
- The IRAL Panel recommended a limited number of reforms to Judicial Review, with which the Government agreed. In March 2021, the Government launched a public consultation on these and some additional proposals for reform. Following the conclusion of the consultation at the end of April the Government refined its proposals in light of the responses it had received.
- Through the Judicial Review measures in the Judicial Review and Courts Bill the Government will address two areas of concern:
 - The flexibility of the remedies the court is able to give. At the moment, they are too often a blunt instrument.
 - The efficiency and structure of the courts system, which is currently undermined by what are known as *Cart* Judicial Reviews – a much used but rarely successful route of challenge.

The Judicial Review and Courts Bill will:

- Protect certain decisions of the Upper Tribunal from Judicial Review, subject to exceptions, thereby removing *Cart* Judicial Reviews.
- Introduce the power to make two modifications to remedies, to be available at judges' discretion:
 - The ability to suspend quashing orders, meaning that an order will only come into effect after a specified period of time. This will allow any concerned parties to make transitional arrangements to manage the impact of the order.
 - The ability to remove or limit the retrospective effect of quashing orders, meaning that a court may prohibit an unlawful decision from being employed in the future (or from a specified date) without invalidating any prior actions based on that decision. This may mitigate any detrimental effects on concerned parties whose affairs had relied on the decision until that point.

What are *Cart* Judicial Reviews?

- A decision made by the UK Supreme Court in 2011 determined that the High Court could judicially review decisions of the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal, whereas previously it was held they could not.
- This judgment therefore opened a new avenue of Judicial Review, and these applications have since been known as *Cart* Judicial Reviews. Such claims are the most numerous type of Judicial Review case (around 750 per year from 2016 to 2019), while resulting in very low success rates (around 3%). By comparison, other types of Judicial Reviews are generally successful in 40-50% of cases.
- The Judicial Review and Courts Bill will reverse the effect of the Supreme Court's 2011 decision, making Upper Tribunal decisions not to grant permission to appeal final, and not subject to review by any other court. This will free up valuable resources in the High Court and uphold the jurisdictional status of the Upper Tribunal.

What is a quashing order?

- A quashing order is an order of the court that revokes the original action or decision being challenged. Currently, the outcome of a quashing order is that the original decision never had any legal effect, and renders any prior actions based on that decision invalid (known as 'retrospective' quashing).
- The Judicial Review and Courts Bill will allow judges to modify the effects of quashing orders, giving them greater discretion to take appropriate remedial action based on the particular considerations and circumstances of each case.

How will this Bill affect the powers and role of the Courts?

- These reforms aim to help restore the place of justice at the heart of our society by ensuring that all the institutions of the state act together in their appropriate capacities to uphold the rule of law. This means that the Courts should and will be able to hold the Government to account in the manner set out by Parliament, and it also means the Government should be able to effectively and efficiently execute Parliament's intent.

How will *Cart* Judicial Reviews be removed?

- The route of *Cart* Judicial Reviews will be removed by way of an ouster clause. Ouster clauses are provisions in legislation that limit the jurisdiction of the Senior Courts in relation to the use of a particular power. While no previous ouster clause has been fully upheld in the courts, the Government is confident that this measure will be sustained.
- The Judicial Review and Courts Bill will amend the Tribunals, Court and Enforcement Act 2007 (TCEA) to insert the ouster clause, which will be narrowly worded to specifically abolish only the *Cart* route of Judicial Review. The ouster clause will include exceptions and so will not operate, for example, in cases of the Upper Tribunal acting outside the functions ascribed to it by Parliament or acting contrary to fundamental legal principles – such as if the court was shown to be biased or corrupt.

What is the impact on the Devolved Nations of removing *Cart*?

- In relation to *Cart* and the Tribunals in Wales, the functioning of the TCEA Upper Tribunal is a reserved matter. The measure does not affect devolved tribunals or their decisions, only decisions of the Upper Tribunal made in relation to applications for permission to appeal decisions of the First-tier Tribunal.
- For Scotland and Northern Ireland, the ouster clause will include a provision so that it does not apply to matters of devolved policy. These proposals will, in large part, remove the jurisdiction of the Court of Session and High Court of Northern Ireland over decisions of the TCEA Upper Tribunal leave to appeal applications from the First-tier Tribunal where the underlying matter is reserved.

How will suspending the effects of quashing orders work?

- Judges will be empowered to suspend the effects of any quashing order they make for any length of time. In practice, this would allow affected parties to prepare for the order being quashed and take any necessary action (such as making transitional arrangements). In similar vein to an appeal, affected parties will still be able to rely on the decision subject to the quashing order up until the date the suspension is ended and it is fully quashed.
- *Example:* Upon finding a decision by a public body to be unlawful the court may make an order such as this:
“The public body’s decision will be quashed on the 30th day from this judgment, on condition that no further steps are taken to enforce it.”
 - This might allow the public body to prepare transitional arrangements, while providing that the unlawful action could not continue to be enforced against third parties.

How will limiting the retrospective effect of quashing orders work?

- The courts will be empowered to make the effects of any quashing order they make prospective only. This limits the effects of the quashing to prevent further reliance, whilst preventing injustice caused to groups that have relied in good faith on the impugned provisions in the past. The courts will have discretion to determine from what date the quashing order will apply, be that in the past or the future.
- *Example:* Upon finding a decision by a public body to be unlawful the court may make an order such as this:
“The decision will be quashed one week from this judgment prospectively only.”

- This means that all past reliance on the decision and any reliance in the following week will always be upheld – as the decision itself, for that time period, will be considered to be valid for all intents and purposes. This may be necessary because the decision concerned a large regulatory scheme, the undoing of which would cause significant economic consequences or prejudice the wellbeing of third parties.
- In relation to an employment regulation that gave employees healthcare protection, for example, immediate quashing may jeopardise the safety of workers. The court might give a prospective order to come into effect in several months, to give the Government time to make new regulations. Meanwhile, employees would be able to rely on the previous regulation.