To what extent will the report of the Independent Review of Administrative Law and the Judicial Review and Courts Bill (when enacted) improve judicial review in England and Wales?

Introduction

Described by Lord Diplock as "the greatest achievement of my judicial lifetime", Judicial Review has established itself as a keystone of the UK's constitutional arrangement.[1] It "can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the executive to account".[2] For the purposes of this essay, Judicial Review ("JR") can be defined as the mechanism by which the legality of decisions made by public bodies can be challenged in court. Crucially, JR is not concerned with the merits of the decision under challenge, moreover the manner in which the decision was reached. In circumstances where the decision-maker is found to have acted outside his powers (*ultra vires*), the High Court will most commonly grant a quashing order, the object of which is to invalidate the unlawful decision or instrument.

Whilst evaluation of the merits of the decision under challenge falls outside the court's jurisdiction, recent government rhetoric suggests that it views many who bring JR claims as politically motivated, or intent on frustrating executive will.[3] In its 2019 manifesto, the Conservative Government committed to ensuring that the process "is not abused to conduct politics by another means".[4] Accordingly, the Independent Review of Administrative Law ("IRAL"), was announced in July 2020 to look afresh at JR.[5] Despite its thoughtful analysis

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[1] *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 [641].

[2] The Lord Chancellor and Secretary of State for Justice, *Judicial review: proposals for reform* (Cm 8703, 2013) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264091/8703.pdf accessed 30 Aug 2021

[3] See Jamie Grierson and Diane Taylor, 'Home Office wrong to refer to 'activist lawyers', top official admits' *The Guardian* (London, 27 Aug 2020) https://www.theguardian.com/politics/2020/aug/27/home-office-wrong-to-refer-to-activist-lawyers-top-official-admits accessed 30 Aug 2021.

[4] The Conservative Party, 'The Conservative and Unionist Manifesto 2019' (2019) https://www.conservatives.com/our-plan accessed 30 Aug 2021.

[5] The Lord Chancellor and Secretary of State for Justice, *The Independent Review of Administrative Law* (CP 407, 2021)

largely vindicating JR's constitutional importance, the Government's Response to the Review questionably noted a "growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves…".[6] The dubious basis for this conclusion precipitated concerns that the IRAL may be used as a fig leaf to justify sweeping reforms to the very substance of JR.

Notwithstanding what the sceptical observer may consider a clear government agenda to curb judicial reach and evade accountability, the legislative changes proposed within the Judicial Review and Courts Bill ("The Bill") are more subtle than widely anticipated.[7] Of the 48 clauses introduced, only two concern JR. This essay will therefore focus exclusively on Clause 1, which bestows further powers upon the court in terms of remedies, and Clause 2, which limits the availability of "*Cart*" JRs. By analysing both the potential practical effects and constitutional implications of these clauses, this essay will demonstrate that any improvements to JR will be modest, and for the most part only felt by the (unlawful) decision-maker.

Clause 1: Quashing Orders

The first proposal within The Bill seeks to add a new section 29A to the Senior Courts Act 1981, the technical effect of which would be to add more strings to the court's bow. As per s.29A(1):

> *(1) A quashing order may include provision—*
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> > *(a) for the quashing not to take effect until a date specified in the order, or*
> > *(b) removing or limiting any retrospective effect of the quashing.*

At present, the options open to the court as regards quashing orders are limited. The order itself is discretionary, but judges are unable to influence its impact. By virtue of s.29A(1), the court will be able to exercise more control by managing and restricting the practical consequences of quashing orders. However, this new discretion is arguably fettered by s.29A(9), which creates a presumption in favour of using the powers enshrined within s.29A(1):

https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf accessed 30 Aug 2021.

[6] The Lord Chancellor and Secretary of State for Justice, *The Government Response to the Independent Review of Administrative Law* (CP 408, 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf accessed 30 Aug 2021.

[7] Judicial Review and Courts HC Bill (2021-22) [152].

(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 adequate redress 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.

Suspended Quashing Orders

The Bill goes on to state that where the effect of a quashing order is suspended pursuant to s.29A(1)(a), the "impugned act is upheld until the quashing order takes effect" and is to be treated as if its validity were "unimpaired".[8] The benefits of such suspended orders were envisaged by the IRAL as twofold: firstly, they could allay "governmental concerns" around perceived judicial overreach, and secondly, they could encourage the grant of quashing orders where to do so under the existing arrangement would be administratively unworkable.[9] S.29A(1)(a) would essentially reverse the decision of the Supreme Court in *Ahmed v HM Treasury,* where the majority considered that suspending a quashing order was not an option available to the court under the common law.[10] Lord Phillips summarised: "This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment. Accordingly, I would not suspend the operation of any part of the court's order".[11]

In addition to going against judicial inclination, suspended quashing orders present a curious technical anomaly. The Court in *Ahmed* made clear that the purpose of a quashing order is simply "to make it quite plain" that the impugned decision or instrument has no legal effect.[12] The quashing order does not invalidate an unlawful decision per se, but instead "makes plain" its invalidity. S.29A(1)(a) therefore bestows upon judges the ability to confer validity upon unlawful decisions and instruments, albeit for a temporary period. The IRAL suggests that this power will be of particular use in circumstances "where a case raises significant constitutional questions" in that Parliament would be able to "clarify or amend" the position before the order takes effect.[13] There is a certain irony that the provision intended to assuage concerns that the courts are overstepping their constitutional boundaries in fact grants judges a quasi-legislative

[8] The JRC Bill (n 7) s 1(1).
[9] The IRAL (n 5) 3.52-53.
[10] [2010] UKSC 5.
[11] *Ibid* [8].
[12] *Ibid* [4].
[13] As paraphrased within the Explanatory Notes to the Judicial Review and Courts Bill, para 17.

power.[14] Regardless, Professor Mark Elliot contemplates that the stance taken by the Court in *Ahmed* does not in itself render suspended quashing orders an improper remedy: "….remedies in judicial review proceedings are discretionary: given that courts can, and sometimes do, withhold relief permanently, it is difficult to understand why it is necessarily improper for courts to do so temporarily".[15]

There is force in Elliot's argument. Indeed, the IRAL supports its proposal by reference to *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills,*[16] where the Court found the decision under challenge unlawful, but refused to grant a quashing order on the basis that its practical ramifications would be too inconvenient. *Hurley and Moore* was a case brought by prospective university students against Regulations introduced by the Secretary of State allowing universities to increase fees by up to £9000 per year. The Respondent was found to have failed to adhere to his public sector equality duties ("PSEDs") such that the potential discriminatory impact of the Regulations was not properly considered. A Declaration that the Respondent had acted unlawfully was issued, and the Claimants were vindicated, albeit still faced with prospects of hefty tuition fees. Giving judgment, Lord Justice Elias said:

> *"… I do not consider that it would be a proportionate remedy to quash the regulations themselves. (…) It would cause administrative chaos, and would inevitably have significant economic implications, if the regulations were now to be quashed".*[17]

Had the option of a suspended quashing order been open to the Court, it may have been the case that such an order were made, the effect of which would have been to allow the Secretary of State a specified timeframe to adequately perform his PSEDs, consider whether the Regulations require amendment, and "prepare for the effect of any quashing".[18] This would surely have been a more desirable outcome for the Claimants, and by no means a disproportionate imposition upon the Respondent (who after all had acted unlawfully).

Prospective-only remedies

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[14] This point was made by Tom Hickman QC in 'Quashing Orders and the Judicial Review and Courts Act' *U.K. Const. L. Blog* (26 Jul 2021) https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act/ accessed 30 Aug 2021.

[15] Mark Elliott, 'Judicial review reform I: Nullity, remedies and constitutional gaslighting' *Public Law for Everyone* (6 Apr 2021) https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/ accessed 30 Aug 2021.

[16] [2012] EWHC 201 (Admin).

[17] *Ibid* [99].

[18] Explanatory Notes (n 13) para 18.

Unlike suspended quashing orders, the introduction of prospective-only remedies was not recommended by the IRAL. By invoking s.29A(1)(b), judges will be able to limit or remove the retrospective effect of quashing orders, thereby conferring permanent validity upon *ultra vires* decisions up until the date that they are found unlawful. The practical effect will be the denial of private rights to those wronged by the unlawful decision or instrument: rights to damages could be restricted, or completely cancelled. The 2017 Supreme Court ruling in *R (Unison) v Lord Chancellor* illustrates this point.[19]

In *Unison,* the Claimant trade union challenged the lawfulness of a statutory instrument that levied fees upon those wishing to bring and pursue claims in the employment tribunals.[20] The Claimant argued that the imposition of fees interfered "unjustifiably with the right of access to justice under both the common law and EU law" such that it erected a financial barrier preventing many from exercising their rights in the employment tribunals.[21] Finding in favour of the Claimant, Lord Reed underscored the declaratory nature of quashing orders*:* "The Fees Order is unlawful under both domestic and EU law because it has the effect of preventing access to justice. Since it had that effect as soon as it was made, it was therefore unlawful *ab initio*, and must be quashed".[22] As a consequence, the Government was required to reimburse over 27 million pounds in total to those who had been charged under the unlawful instrument.[23] Were the Judicial Review and Courts Bill enacted at the time that Unison brought the claim, the chance of such an outcome in the event of a positive ruling would have been significantly diluted. Lack of certainty in this regard may well have dissuaded the Claimant from pursuing the case either following its defeat in the High Court, or the Court of Appeal.[24]

Indeed, the possible impact of lack of certainty for prospective claimants must not be understated. For those who fall outside the narrowly defined eligibility criteria for legal aid, bringing a claim by way of JR is a costly endeavour. Coupled with the existing risk that a loss

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[19] [2017] UKSC 51.
[20] The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.
[21] Ex parte *Unison* (n 19) [3].
[22] Ex parte *Unison* (n 19) [119].
[23] Sarah Marsh and Jessica Elgot, 'Ministers vow to end employment tribunal fees after court defeat' *The Guardian* (London, 26 Jul 2021) https://www.theguardian.com/money/2017/jul/26/union-supreme-court-fees-unfair-dismissal-claims accessed 30 Aug 2021.
[24] *R (Unison) v Lord Chancellor* [2014] EWHC 218 (Admin); *R (Unison) v Lord Chancellor* [2015] EWCA Civ 935.

could result in liability for the state's legal costs, uncertainty as to the remedy at the end of the tunnel has potential to detract hopeful claimants from bringing challenges (no matter how meritorious). Conversely, while courts may be reluctant to uphold challenges to executive decisions that form the foundations for far-reaching policy, the ability to manage the consequences of a quashing order may mean that judges are more inclined to grant them. As such, the Bill may have the effect of rendering JR claims more "low risk, low reward".

As a final consideration, it should be noted that the proposed S.29A does not distinguish between different categories of unlawful act. Its' provisions will therefore apply equally to all, be they minor procedural deficiencies, decisions that expressly contravene statute, or as *Unison,* instruments that directly interfere with basic constitutional rights. Referencing *Unison* in its written submissions to the Government's consultation on JR reform, rights group Liberty observed that: "a prospective only remedy in this scenario would have been a serious injustice to the claimants whose fundamental rights to access to justice had been found to have been violated".[25] One might reasonably assume that a "serious injustice" would constitute "*good reason*" for the courts to digress from the presumption created by s.29A(9), although it remains to be seen how this threshold will be interpreted.

Clause 2: *Cart* Judicial Reviews

Clause 2 of the Bill reverses *R (Cart) v Upper Tribunal,* authority that decisions of the Upper Tribunal (UT) refusing permission to appeal against a decision of the First Tier Tribunal (FTT) can be challenged by JR where the decision was possibly affected by an error of law. It does so by expressly ousting the jurisdiction of the Administrative Court through the insertion of section 11A into the Tribunals, Courts and Enforcement Act 2007. S.11A(2) provides that a decision by the UT to refuse permission to appeal is "*final, and not liable to be questioned or set aside in any other court".* S.11A(3) proceeds to state that:

> *(3) In particular*
>
> > *(a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;*
> >
> > *(b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.*

[25] Liberty, 'Written Evidence to the Ministry of Justice (Judicial Review Reform)' (April 2021) https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/04/Libertys-JR-reform-submissions-FINAL.pdf accessed 30 Aug 2021.

The above does not apply in exceptional circumstances clearly demarcated by s.11A(4), including where the UT is or was acting "in fundamental breach of the principles of natural justice". S.11A can therefore be described as a 'partial ouster clause', such that it limits but does not entirely remove the availability of JR in the above outlined context. The Government considers that the provision will serve to properly discharge the intention of Parliament:

> *"As stated in the explanatory notes to the Tribunals, Courts and Enforcement Act 2007, "the Upper Tribunal is a superior court of record, like the High Court." In declaring Upper Tribunal decisions amenable to Judicial Review, the Supreme Court effectively downgraded the intended status of the Upper Tribunal".*[26]

But whilst the UT and the High Court are intended to rest on an equal footing, their expertise is by design distinct. The Administrative Court exists to "review decisions made by people or bodies with a public law function",[27] whereas Upper Tribunal judges benefit from specialist knowledge in their fields, for example immigration and asylum. As the Public Law Project (PLP) points out, "this (expertise) does not mean that they are infallible and errors of law will inevitably arise in any jurisdiction".[28] It would be remiss to conclude that equivalent status should necessarily render the UT impervious to the High Court's supervisory jurisdiction, an arrangement which could isolate the Tribunal system from the wider judicial apparatus. Empathising with the Government's constitutional concerns, Mikołaj Barczentewicz makes a case for less dramatic reform.[29] In lieu of removing the availability of *Cart* JRs, Barczentenwicz proposes that they ought to be put on a statutory footing. In doing so, he posits that the Government would be able to manage the relationship between the High Court and the Tribunal system, whilst clarifying points of procedure.

The Bill's explanatory notes shed further light on the empirical basis for the near abolition of *Cart* JRs:

> *"Since Cart JRs came into existence the number of challenges via this route is high, and the success rate is low. The IRAL panel assessed this success rate as just 0.22%.*

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[26] Government Response to the IRAL (n 6) para 51.

[27] See https://www.gov.uk/courts-tribunals/administrative-court accessed 30 Aug 2021.

[28] Public Law Project, 'Consultation response: Judicial Review Proposals for Reform' (Apr 2021) https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf accessed 30 Aug 2021.

[29] Mikołaj Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response', https://ukconstitutionallaw.org/2021/05/05/mikolaj-barczentewicz-should-cart-judicial-reviews-be-abolished-empirically-based-response/ accessed 30 Aug 2021.

> *Having investigated this further the Government believes that the success rate is slightly higher and estimates it is around 3%".*[30]

Noting the apparent rarity with which *Cart* JRs successfully result in an error of law being identified and corrected, the IRAL concluded that: "the continued expenditure of judicial resources on considering applications for a Cart JR cannot be defended, and that the practice of making and considering such applications should be discontinued".[31] However, the statistics upon which the recommendation to remove *Cart* JRs is founded are misleading, and the methodology used to generate them flawed. The 0.22% success rate determined by the IRAL only takes into account reported cases,[32] of which 45 were identified out of 5,502 applications. Of these 45 cases, errors of law were identified in 12. The credibility of the of 0.22% statistic thus relies upon an assumption that the unreported 5,475 cases were all unsuccessful.[33] The accurate rate of success is therefore undoubtedly higher than 0.22%, and likely higher than the Government estimate of 3%. Even taking the 3% success rate as fact, this represents 166 individuals, who without recourse to the *Cart* route of challenge would have been left with no appeal rights.

The Government itself has acknowledged that the removal of *Cart* JRs may cause "some injustice".[34] Against a backdrop of general endorsement for the proposal in the House of Lords, Lord Marks rightly observed the "particular sensitivity" of *Cart* JRs, "almost all" of them being immigration cases.[35] Cases brought in the Immigration and Asylum Chambers range from determination of refugee status to family reunification, and often engage the claimant's rights guaranteed by the European Convention on Human Rights.[36] They are likely to be of overwhelming importance to claimants, and potential injustices occasioned by the removal of the *Cart* route will be severely compounded by their material ramifications.

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[30] Explanatory Notes (n 13) para 26.
[31] The IRAL (n 5) 3.46.
[32] The cases studied were heard between 2012-2019.
[33] This is explored in depth by Joe Tomlinson and Alison Pickup. See Joe Tomlinson and Alison Pickup, 'Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews' *U.K. Const. L. Blog* (29 Mar 2021) https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/ accessed 30 Aug 2021.
[34] Government Response to the IRAL (n 6) para 52.
[35] HL Deb 22 March 2021, vol 811, col 707.
[36] Most notably Article 3 ECHR: Freedom from torture and inhumane and degrading treatment, and Article 8 ECHR: Right to respect for family and private life.

Highlighting the significance of cases to the individual bringing them does not, however, address the legitimate issue of unmeritorious claims depleting vital judicial resources. Lady Hale in *Cart v Upper Tribunal* made plain that the importance of individual cases cannot override concerns around scarcity of resources: "[t]here must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in any individual case".[37] Speaking in a similarly pragmatic vein, Lord Phillips noted: "in exercising the power of judicial review, the judges must pay due regard to the fact that, even where the due administration of justice is at stake, resources are limited".[38] The Supreme Court's stance is undeniably rational, but the question remains: do finite resources justify the outright removal of *Cart* JRs? There are already numerous measures in place to limit the number of *Cart* claims, including a narrow time frame to bring the claim,[39] and a high threshold to satisfy.[40] If the Government considers that these measures are insufficient, it could, as proposed by Barczentewicz, recommend that Parliament legislate for *Cart* JRs, and use the opportunity to introduce further (more stringent) controls.

Conclusion

Until the Bill becomes law, it is difficult to predict how the courts will engage with its provisions, and therefore how JR may change (and indeed improve). What is clear is that the benefits of suspended quashing orders are certainly more apparent than those of prospective-only remedies, whose potential advantages seem only to apply to the decision-maker. Whilst both introduce less certainty for claimants, the former may have the effect of more quashing orders being granted. The benefits for the public body under scrutiny are more evident: through the introduction of prospective-only remedies, Clause 1 will go so far as to reward unlawful decisions with permanent validity. As regards Clause 2 and *Cart*, the Government would be well advised to reconstitute the IRAL such that the panel may revisit its methodology, and "undertake an in-depth study of immigration cases" as desired.[41] The panel might then return to the question of *Cart*, and explore alternative ways to save resources whilst mitigating otherwise inevitable injustices.

[37] [2011] UKSC 28 [41].
[38] *Ibid,* [89].
[39] See Civil Procedure Rule 54.7A(3).
[40] *Ex parte Cart* (n 35) [130].
[41] The IRAL (n 5) 12.